Supreme Court, U. S.
FILED
JUL 5 1980
MICHAEL RODAK, JR., CLERK

NO. 80-14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FAYETTEVILLE STREET CHRISTIAN SCHOOL, ET AL.
Appellants

VS.

STATE OF NORTH CAROLINA, ET AL.
Appellees

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

I. BEVERLY LAKE
c/o Lake & Nelson, P. A.
P. O. Box 1306
Raleigh, North Carolina 27602
Tel. No. 919 – 828-1135
Counsel of Record for Appellants

Of Counsel:
THOMAS E. STRICKLAND
c/o Strickland & Fuller
P. O. Box 2002
Goldsboro, North Carolina 27530

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF NORTH CAROLINA, THE CHILD DAY-CARE LICENSING COMMISSION OF THE DEPARTMENT OF ADMINISTRATION and JOSEPH W. GRIMSLEY, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION, EX REL, RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA

v.

FAYETTEVILLE STREET CHRISTIAN SCHOOL and its Operator, MR. BRUCE D. PHIPPS; GOSPEL LIGHT CHRISTIAN SCHOOL and its Operator, MRS. DELORES B. YOKELY; GRACE CHRISTIAN SCHOOL and its Operator, MR. EARL R. EATON; IMMANUEL DAY CARE CENTER, and its Operator, MRS. ELIZABETH HARRELL; BAPTIST TEMPLE SCHOOL and its Operator, MR. DONALD R. CARTER; GRACE CHRISTIAN SCHOOL and its Operator, MR. ROBERT DURHAM; BETHANY CHURCH SCHOOL and its Operator, REVEREND GENE WOODALL; TABERNACLE CHRISTIAN DAY CARE and its Operator, MR. RANDALL SHOOK; SOUTH PARK BAPTIST SCHOOL and its Operator, MR. DANIEL D. CARR; GOSPEL LIGHT BAPTIST CHURCH and its Operator, REV. GARY BLACKBURN; FRIENDSHIP CHRISTIAN SCHOOLS and its Operator, MR. CHARLES STANLEY; and ALL OTHERS SIMILARLY SITUATED.

NUMBER ————————

October Term 1980

JURISDICTIONAL STATEMENT

Pursuant to Rules 12 and 15, the appellants submit the following jurisdictional statement:

(a) *Questions Presented By This Appeal*

(1) When a state trial court, after denying a motion to

dismiss filed on First Amendment grounds, conducts an adversary hearing on affidavits and grants a preliminary injunction enjoining a church from operating on its own property a child day-care center, which is a part of the church's religious ministry and has been operated in a safe and orderly manner, until the church procures a license from a state agency having discretion to deny it, and the highest court of the state adjudges such order unappealable under state law, refuses to stay the enforcement of the injunction and remands the case to the trial court for further proceedings, which appear certain to be a mere formality, is there a final judgment of the state court within the meaning of 28 U.S.C. 1257?

(2) When a church operates or proposes to operate a child day-care center as part of its religious ministry upon its own property in a safe and orderly manner, may a state, consistent with the Free Exercise of Religion Clause of the First Amendment, incorporated into the Fourteenth Amendment to the Constitution of the United States, require it to procure a license from a state agency vested by statute with a discretion to deny it?

(b) *Parties.*

All parties to this proceeding in the court below are named in the caption to this jurisdictional statement.

TABLE OF CONTENTS

PAGE

Questions Presented by Appeal 1
List of Parties in Court Below 2
Table of Contents 3
Table of Authorities 3A
Reference to Reports of Opinions in Courts Below 4
Grounds on which Jurisdiction of this Court Invoked 4
Nature of Proceeding 4
Dates of Judgment to be Reviewed, Order Respecting Rehearing, and of Notice of Appeal 6
Statute Conferring Jurisdiction 6
Cases Sustaining Jurisdiction 6
Constitutional Provisions Involved 7
Statute of North Carolina Involved 8
Statement of the Case 8
Reasons Questions Presented Are Substantial so as to Require Plenary Consideration 12
Conclusion 18
Certificate of Service 20
Appendix 21
Original Opinion of Supreme Court of North Carolina 22
Order of Supreme Court of North Carolina Allowing Rehearing 33
Opinion of Supreme Court of North Carolina on Rehearing 35
Opinion of North Carolina Court of Appeals 39
Judgment of Trial Court 53
Notice of Appeal to Supreme Court of the United States 62
North Carolina General Statutes, Chapter 110, Article 7 65

TABLE OF AUTHORITIES

PAGE

CONSTITUTIONAL PROVISIONS:

First Amendment to the Constitution of the United States.... 8
Fourteenth Amendment to the Constitution of the United States..... 8

STATUTES:

28 U.S.C., Section 1257(2)..... 6
North Carolina General Statutes, Chapter 110, Article 7 .....8, 65

CASES:

American Radio Ass'n, AFL-CIO, et. al. v. *Mobile Steamship Ass'n, Inc.*, 419 U.S. 215..... 6
Barnette v. *W. Va. Bd. of Education*, 319 U.S. 624.....7, 13
Cantwell v. *Connecticut*, 310 U.S. 296.....7, 13
Construction & General Laborers' Union vs. *Curry*, 371 U.S. 542..... 7
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469.....6, 16, 18
Department of Banking v. *Pink*, 317 U.S. 264..... 7
Fowler v. *Rhode Island*, 345 U.S. 67.....7, 13
Jones v. *Opelika*, 316 U.S. 584.....7, 13, 14
Lovell v. *Griffin*, 303 U.S. 444.....7, 13
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241..... 6
Mills v. *State of Alabama*, 384 U.S. 214..... 7, 16, 17
Murdock v. *Pennsylvania*, 319 U.S. 105.....7, 13
North Dakota State Bd. of Pharmacy v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156.....6, 16
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539.....14

Organization For A Better Austin v. *Keefe*,
402 U.S. 415 ..... 7, 15, 16, 17
Pope v. *Atlantic Coast Line R. Co.*, 345 U.S. 379 7
Richfield Oil Corp. v. *State Board*, 329 U.S. 69 ..... 7, 16
Schneider v. *State*, 308 U.S. 147 7
Thomas v. *Collins*, 323 U.S. 516 ..... 7, 14
Thornhill v. *Alabama*, 310 U.S. 88 7

(d) *Reference To Opinions In Courts Below*

The opinion of the Supreme Court of North Carolina containing the judgment of that court here sought to be reviewed is reported in 299 N.C. 351, 261 S.E. 2d 908. The order of that court allowing appellants' petition for rehearing, dated 20 February 1980, is not reported. The opinion of that court containing its judgment after rehearing, reaffirming its original judgment, is reported in 299 N.C. 731, 265 S.E. 2d 387. The opinion of the North Carolina Court of Appeals containing its judgment from which the defendants appealed to the Supreme Court of North Carolina, is reported in 42 N.C. App. 665, 258 S.E. 2d 459.

(e) *Grounds on which jurisdiction of the Supreme Court of the United States is invoked:*

(i) This appeal is brought pursuant to 28 U.S.C. Sec. 1257(2). The State brought this suit in the Superior Court of Wake County, North Carolina, for a preliminary and a permanent injunction enjoining the defendants from operating, without a license from the State, child day-care centers, which

the appellants contend are integral parts of their respective church ministries. The State contends that the procurement from its agency of such license is a condition precedent to the operation of any such child day-care center by virtue of North Carolina General Statutes, Chapter 110, Article 7, more specifically, Section 98.

In response to a show cause order, the appellants moved to dismiss for the reason that, as applied to them, the said statute is in conflict with the Free Exercise of Religion Clause of the First Amendment, incorporated into the Fourteenth Amendment, to the Constitution of the United States. Their motion to dismiss was denied and the trial court on 11 December 1978, after an adversary hearing on affidavits, made findings of fact and entered its order granting a preliminary injunction enjoining the defendants from opening or operating any day-care facilities until such time as they procure from the State a license in compliance with the statute.

The appellants appealed to the North Carolina Court of Appeals and obtained from it a supersedeas pending the decision of that court, the trial court having refused to stay enforcement of its order. The North Carolina Court of Appeals gave judgment affirming the judgment of the trial court.

The defendants appealed to the Supreme Court of North Carolina and obtained from it a supersedeas pending its decision. The Supreme Court of North Carolina rendered its judgment to the effect that the order of the trial court is not appealable under State law, vacating the judgment of the North Carolina Court of Appeals, vacating its own writ of supersedeas and remanding the case to the trial court for further proceedings. This is the judgment now sought to be reviewed. The defendants filed a petition for rehearing, which petition the Supreme Court of North Carolina allowed, reinstating its writ of supersedeas. Following the rehearing, the Supreme Court of North Carolina entered its final judgment reaffirming its original judgment, again vacating its writ of

supersedeas and remanding the case to the trial court for further proceedings. The defendants filed their Notice of Appeal to the Supreme Court of the United States on 19 June 1980.

(ii) The judgment of the Supreme Court of North Carolina sought to be reviewed is dated 1 February 1980 but was not certified to the lower court until 28 April 1980, following rehearing. The order of that court granting a rehearing is dated 20 February 1980. The judgment of that court, following rehearing, is dated 8 April 1980 and was certified to the lower court 28 April 1980. The Notice of Appeal to the Supreme Court of the United States was filed 19 June 1980, in the Supreme Court of North Carolina.

(iii) The statutory provision believed to confer upon the Supreme Court of the United States jurisdiction of this appeal is 28 U.S.C. Sec. 1257(2) reading:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity."

Cases believed to sustain jurisdiction are:

As to finality of the State court judgment:

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975);

American Radio Ass'n, AFL-CIO, et al. v. Mobile Steamship Ass'n, Inc., 419 U.S. 215, 95 S. Ct. 409, 42 L. Ed. 2d 399, footnote 1 (1974);

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974);

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973);

Organization For A Better Austin v. Keefe, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971);

Mills v. State of Alabama, 384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966);

Construction & General Laborers' Union v. Curry, 371 U.S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514 (1962).

Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 73 S. Ct. 749, 97 L. Ed. 1094 (1953).

Richfield Oil Corp. v. *State Board,* 329 U.S. 69, 67 S. Ct. 156, 91 L. Ed. 80 (1946);

Department of Banking v. Pink, 317 U.S. 264, 63 S. Ct. 233, 87 L. Ed. 254 (1942);

As to the Merits:

Fowler v. Rhode Island, 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953);

Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945);

Barnette v. West Virginia Board of Education, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943);

Jones v. Opelika, 316 U.S. 584, 62 S. Ct. 1231, 86 L. Ed. 1691 (1942), reversed in part on another point in *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1942);

Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940);

Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940);

Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939);

Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).

(f) The provisions of the Constitution of the United States

which are involved are the Religion Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment, which read:

> *First Amendment:* "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."
>
> *Fourteenth Amendment:* * * * No state shall * * * deprive any person of life, liberty, or property, without due process of law; * * *."

The North Carolina statute involved is North Carolina General Statutes 110-98, found in Vol. 3A, Part I, at Page 434. This is a portion of a lengthy Act, N.C.G.S. 110-85 to 110-103 which is appended in full hereto. The specifically pertinent provision of Section 110-98 reads:

> "It shall be unlawful for any day-care facility to offer or provide day care without being licensed under the provisions of this Article."

A copy of the judgment of the Supreme Court of North Carolina, a copy of the order of that court allowing rehearing, a copy of its judgment following rehearing, a copy of the judgment of the North Carolina Court of Appeals, a copy of the judgment of the trial court which is thus allowed to remain indefinitely in effect, and a copy of the Notice of Appeal to the Supreme Court of the United States are appended hereto.

(g) *Statement of the Case*

The appellant institutions are unincorporated departments or agencies of eleven Christian churches scattered throughout North Carolina. Each operates a non-profit child day care center to which working parents take their small children for care, supervision and instruction while the parents are at work. The appellant individuals are the supervisors of the centers.

The several churches are completely independent and are

unaffiliated with each other, except that they share a common religious faith and purpose. Each day care center is wholly controlled by its parent church and is operated within the church building, or upon its adjacent grounds, by the church as part of its religious ministry to its members and others in the vicinity. (R. pp. 88 – 95.)

The several centers are regularly inspected and have been approved by local fire and health departments for sanitation, fire and health hazards. (R. pp. 95 – 112.) The record does not show a single instance at any of the centers of child neglect, child abuse, child injury or illness due to conditions at the day care center, parental complaint or inadequate or unsafe housing or facilities.

The North Carolina statute (General Statutes, Ch. 110, Article 7, Secs. 110-85 to 110-103, more specifically, Section 110-98) provides it shall be unlawful for any day care facility to operate without obtaining from the State's Child Day Care Licensing Commission a license which must be renewed annually. Other sections of the Act vest in the Commission a discretion in granting or denying applications for license. Violation of the statute is a misdemeanor.

The appellant institutions first applied for and obtained licenses. Subsequently, with no change in their operations, reaching the conclusion that to seek from the State a license or permit to carry on this integral part of their respective religious ministries is contrary to God's command and a violation of their rights under the Free Exercise of Religion Clause of the First Amendment, incorporated into the Fourteenth Amendment, the appellant institutions surrendered these licenses for cancellation or, upon expiration, failed and refused to apply for renewal. All licenses issued to these appellants have now expired.

The State instituted this action on 20 October 1978, asking "That a preliminary and permanent injunction be issued en-

joining the defendants * * * from operating any day-care facilities until such time as they shall have obtained valid day-care licenses." (R. p. 13.) The trial court issued a show cause order. (R. p. 14.) In response thereto, the appellants moved to dismiss and to deny the prayer for a preliminary injunction for the reason, among others, that the statute upon which the State relies is, as applied to the appellants, in conflict with the Free Exercise of Religion Clause of the First Amendment to the Constitution of the United States, incorporated into the Fourteenth Amendment thereto. (R. pp. 18-19.) The federal question sought to be reviewed was thus raised immediately in the trial court. This motion was heard and denied by the trial court. (R. pp. 26-27.) To this the appellants excepted (R. p. 27). The trial court then heard, on affidavits submitted by both parties, the motion of the State for a preliminary injunction and, at the conclusion of such hearing, made findings of fact and entered its order providing:

> "(T)he named defendants, their agents, servants, employees members or anyone else acting by, under, through or in concert with them are hereby enjoined from opening or operating any day-care facilities until such time as they have complied with Article 7 of Chapter 110 of the General Statutes * * *." (R. pp. 36-37.)

To the entry of this order the appellants excepted (R. p. 37), and from it they appealed to the North Carolina Court of Appeals (R. p. 37), assigning as error (among others) the denial of their motion to dismiss and the granting of the preliminary injunction as violations of their rights to the free exercise of their religion protected by the First and Fourteenth Amendments to the Constitution of the United States (R. pp. 120, 124-125).

Thereafter, in accordance with state procedure, the appellants filed in the trial court their answer to the State's complaint (R. pp. 113-118), again asserting their above mentioned

rights under the First and Fourteenth Amendments to the United States Constitution.

The appellants' motion in the trial court for the entry of an order staying enforcement of the preliminary injunction, pending the determination of their appeal to the North Carolina Court of Appeals (R. p. 39-40), was denied by the trial court (R. pp. 41-42), but, upon the appellants' application to it therefor, the North Carolina Court of Appeals issued its writ of supersedeas.

The appellants' appeal was heard by the North Carolina Court of Appeals, in which court, both by brief and in oral argument, the appellants renewed their assertion of their above mentioned rights under the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals rendered its judgment affirming the order of the trial court and dissolving its own writ of supersedeas.

The appellants appealed to the Supreme Court of North Carolina, again asserting in their notice of appeal and by brief and oral argument their above mentioned rights under the First and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of North Carolina issued its writ of supersedeas.

The Supreme Court of North Carolina rendered its judgment to the effect that the order of the trial court was not appealable, vacated the judgment of the North Carolina Court of Appeals, remanded the case to the trial court for further proceedings and dissolved its own writ of supersedeas.

The appellants thereupon petitioned the Supreme Court of North Carolina for rehearing, which petition was allowed and the writ of supersedeas was reinstated pending such reconsideration.

On 8 April 1980 the Supreme Court of North Carolina rendered its final judgment, reaffirming its previously stated view that the order of the trial court is not appealable, vacating

the judgment of the North Carolina Court of Appeals, remanding the case to the trial court for further proceedings and dissolving its own writ of supersedeas. This judgment was certified to the lower court on 28 April 1980.

On 19 June 1980, the appellants filed with the Clerk of the Supreme Court of North Carolina their Notice of Appeal to the Supreme Court of United States, pursuant to 28 U.S.C. Section 1257(2).

(h) *Grounds Upon Which It Is Contended The Federal Questions Are Substantial.*

As a practical matter, the determination of the federal constitutional question, however it be determined, will end this litigation. The material facts are not in dispute. Further proceedings in the trial court can give rise to no other federal question now known to the appellants. They are not aware of any other material question of state law likely to arise in the trial court, or of any non-cumulative material evidence which can be presented to the trial court concerning the federal constitutional question on further proceedings in the trial court.

The record shows (R. pp. 88 – 95) that the child day care centers are integral parts of the religious ministries of the respective parent churches, providing both competent, professional care and Christian training for small children of working parents while the parents are necessarily absent from their homes due to their jobs. The quality of the care and training is not challenged by the State.

The record further shows (R. pp. 88 – 95) that the appellants believe the operation of these centers for these purposes is a significant part of their religious duty to God and, in this respect, is inseparable from other phases of the work and services of the respective churches. The State's own evidence, by affidavit in the record (R. pp. 70 – 81), shows the appellants surrendered and refused to apply for renewals of their respective licenses because:

"It is our conviction after careful examination of the Holy Scriptures and the Constitutions of the United States and of the State of North Carolina that for us to any longer accept a license from the State for our church Day Care ministry is wrong. We recognize the seriousness of the position we are taking but before God in all good conscience we can do no other. * * * We cannot in all good conscience allow the State to license a ministry of our church."

Nothing whatever in the record challenges the sincerity of these religious convictions or that they constitute the sole reason for the refusal of the appellants to seek a license for their day care operations. The First Amendment protects from governmental interference the exercise of sincerely held religious views and religious services not, in themselves, harmful or dangerous. It is not for the courts, or any other agency of government, to inquire into the reasonableness of religious views so held. See: *Barnette* v. *West Virginia Board of Education,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). "It is no business of courts to say what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *Fowler* v. *Rhode Island,* 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953).

A State may not, consistent with the First Amendment, incorporated into the Fourteenth, impose a previous restraint upon the exercise of religion by requiring the procurement of a license or permit therefor from an administrative official or agency vested with discretion to grant or deny the application. *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 S. Ct. 870, 87 L. Ed. 1291 (1942); *Lovell* v. *Griffin,* 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938); *Jones* v. *Opelika,* 316 U.S. 584, 62 S. Ct. 1231, 86 L. Ed. 1691 (1942), reversed in part on another point (being thereby actually broadened on the point here involved) in *Murdock* v. *Pennsylvania,* 319 U.S. 105, 63 S. Ct.

870, 87 L. Ed. 1292. The North Carolina statute (North Carolina General Statutes Ch. 110, Article 7, Sec. 90) vests such discretion in the Secretary of Administration, acting through the Child Day Care Commission. "Prior restraints on speech and publication are the most serious and least tolerable infringements on First Amendment rights." *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). In this respect: "No difference of view as to the importance of the freedoms of press and religion exist. They are fundamental personal rights and liberties." *Jones* v. *Opelika, supra.* "Any attempt to restrict [the First Amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. * * * Only the gravest abuses, endangering paramount interests give occasion for permissible limitation." *Thomas* v. *Collins,* 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945). There is nothing whatever in the present record to suggest any such abuse or threat to a paramount interest of the state.

The federal constitutional question presented by this appeal is: When a church, or a department thereof, operates, or proposes to operate, a child day care center, as part of its religious ministry, upon its own property in a safe and orderly manner, may a state, consistent with the First and Fourteenth Amendments, require it, as a condition precedent to such operation, to procure a license or permit from a state agency vested by statute with a discretion to deny it? It is submitted that this question is clearly a substantial one. In view of the decision by the North Carolina Supreme Court in this case, remanding the case to the trial court for further proceedings and leaving in effect the preliminary injunction forbidding such operation by the appellants until they procure such license, we submit that the question is so substantial as to require plenary consideration with briefs on the merits and oral argument for its resolution.

The present status of the matter is this: The appellants stand "enjoined from opening or operating any day-care facilities until

such time as they have complied with Article 7 of Chapter 110 of the General Statutes" of North Carolina, or until further proceedings are had in the trial court at some presently undetermined time. There are only two possible ways for the appellants to comply with this order: (1) They can close and cease to operate their day care centers, which, as the North Carolina Supreme Court has said, will render the case moot and foreclose any opportunity for them to obtain a determination of the constitutional question. To compel them to do so will clearly deprive them of the right to use their own property for a lawful, peaceful, useful purpose and so will violate the Due Process Clause of the Fourteenth Amendment. It would also be a surrender by them, under compulsion of this order, of their right to exercise their religion and serve God through the training of the children committed to their care in violation of the First and Fourteenth Amendment. (2) They can apply for and procure a license for such operation, which would be a surrender, under compulsion of this order, of their deeply and sincerely held religious conviction, a violation of their right under the First and Fourteenth Amendments. To operate in disregard of the order will subject them to punishment for contempt.

To close these day care centers would, furthermore, cause serious disruption of the work and child-care programs of the parents of the children enrolled. Working parents now take their children to the centers in the early morning and leave them there, until the parents return from their own work, in safe, comfortable surroundings under professional supervision in an environment and with instruction conducive to the development of Christian character. Nothing in the record suggests that these parents can find other child care arrangements in which they have confidence and which they can afford to utilize.

The present procedural posture of this case is precisely the same as was the posture of *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971),

as is shown in Mr. Justice Harlan's dissenting opinion therein.

Notwithstanding the statement by the Supreme Court of North Carolina that it did not determine the constitutional question raised by the appellants before it, and its remand of the case to the trial court for further proceedings, its judgment is a final judgment within the meaning of 28 U.S.C. 1257. How the state court designates its judgment is not determinative of this federal question. *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 67 S. Ct. 156, 91 L. Ed. 80 (1946); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328, Footnote 8 (1975). That the highest court of the State has remanded the case to the trial court for further proceedings is not conclusive of this question. *Cox Broadcasting Corp.* v. *Cohn, supra,* at 479; *Mills* v. *Alabama,* 384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973). Nor does the fact that the State judgment granted a preliminary or temporary injunction only, the issuance of a permanent injunction awaiting further proceedings, deprive the present judgment of finality. *Organization For A Better Austin* v. *Keefe,* 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1. "The question is whether it can be said 'there is nothing more to be decided.' " *Richfield Oil Corp.* v. *State Board of Equalization, supra,* at 72.

The facts in the present case are undisputed. The appellants operate child day care centers. They have no license to do so and have declined to apply therefor because of their religious convictions. The day care centers are operated in the church buildings or on adjacent church property. There has been no complaint or suggestion of inadequate, unsafe or unsanitary care, supervision or facilities. The appellants know of no other material, noncumulative evidence they can present at the further proceedings in the trial court, or any other question of state law than those heretofore presented to the trial court and de-

termined adversely to them. No other federal question is foreseeable in such further proceedings. As Mr. Chief Justice Burger, speaking for the Court in *Organization For A Better Austin* v. *Keefe, supra,* observed, "Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction * * * will be little more than a formality." Upon the issuance of such permanent injunction the appellants will again appeal to the North Carolina Court of Appeals, which has already determined the constitutional issue and all questions of state law adversely to the appellants' contentions, and then they will appeal once more to the North Carolina Supreme Court, Whether supersedeas will be granted by the state appellate courts is presently unknown.

This process will consume at least another year, probably two, and will be expensive to all parties and wasteful of the time of courts already burdened with congested dockets. Meanwhile, assuming the day care centers are not closed, which the North Carolina Supreme Court has said will render the case moot and foreclose any consideration of the constitutional question, the appellants will be compelled to violate their religious belief or be subject to punishment for contempt.

It is true, as was true in the *Better Austin* case, *supra,* there is the possibility that when the case finally again reaches the Supreme Court of North Carolina, that court may pass upon the federal question favorably to these appellants, but that possibility is not a justification for a rejection of jurisdiction now by the Supreme Court of the United States. The constitutional question is ripe for decision now and its decision, whichever way this Court decides it, will terminate the litigation.

As the Court said in *Mills* v. *Alabama, supra,* at 217-218, to dismiss the present appeal for want of finality in the state court's judgment "would not only be inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but would also result in a completely unnecessary waste of time and energy in judicial systems already troubled

by delays due to congested dockets." The present case meets the "pragmatic" test of finality recognized by the Court, speaking through Mr. Justice White, in *Cox Broadcasting Corp.* v. *Cohn, supra* at 486. As the Court there said, these appellants "may prevail at trial on nonfederal grounds, it is true, but if the [state] court erroneously upheld the statute there should be no trial at all. * * * [I]f we now hold that the First and Fourteenth Amendments bar [the action] this litigation ends."

The Constitution of the United States does not permit a state to deprive the appellants of their First Amendment rights for a little while. The state may not deprive the people of the free exercise of religion at all. The decision of the North Carolina Supreme Court and its dissolution of its writ of supersedeas is clearly a final judgment insofar as the validity of the preliminary injunction is concerned. The effect of this "final" judgment of the North Carolina Supreme Court is that at least until the matter can be returned to the calendar of the trial court and be heard by it, these appellants have only three roads open to them: (1) close their child care centers, which will render the constitutional question moot, (2) apply for a state license to operate, which their consciences forbid them to do, or (3) risk punishment for contempt. Thus, the federal constitutional question they have raised is substantial and its prompt determination is urgent.

CONCLUSION

It is, therefore, submitted that the judgment of the Supreme Court of North Carolina, from which this appeal is taken, is a final judgment within the meaning of 28 U.S.C. Section 1257(2), that the federal question presented is substantial so as to require plenary consideration with briefs on the merits and oral argument for its resolution and the Supreme Court of the United States has jurisdiction to hear and determine this appeal upon its merits pursuant to 28 U.S.C. Section 1257(2).

Respectfully submitted this the 2nd day of June, 1980.

I. Beverly Lake
Lake & Nelson, P. A.
Post Office Box 1306
Raleigh, North Carolina 27602
Counsel of Record for Appellants

Of Counsel:
Thomas E. Strickland
Strickland and Fuller
Post Office Box 2002
Goldsboro, N. C. 27530

CERTIFICATE OF SERVICE

I, I. BEVERLY LAKE, counsel of record for the defendant appellants and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this date I personally served three printed copies of the foregoing Jurisdictional Statement upon the plaintiff appellees, the only adverse parties, by delivering the said copies personally to Honorable Andrew Vanore, Deputy Attorney General of North Carolina, counsel of record for all of the said plaintiff appellees, at his office in the Justice Building, Raleigh, North Carolina.

This the 2nd day of July, 1980.

I. BEVERLY LAKE

Lake & Nelson, P. A.
Post Office Box 1306
Raleigh, North Carolina 27602
Counsel of Record for Appellants

APPENDIX

TO

JURISDICTIONAL STATEMENT

IN THE
SUPREME COURT OF NORTH CAROLINA

FALL TERM 1979

No. 125 — From Wake

The State of North Carolina, The Child Day-Care Licensing Commission of the Department of Administration and Joseph W. Grimsley, Secretary of the Department of Administration, ex rel, Rufus L. Edmisten, Attorney General of North Carolina

v.

Fayetteville Street Christian School and its Operator Mr. Bruce D. Phipps; Gospel Light Christian School and its Operator Mrs. Delores B. Yokely; Grace Christian School and its Operator Mr. Earl R. Eaton; Immanuel Day Care Center and its Operator Mrs. Elizabeth Harrell; Baptist Temple School and its Operator Mr. Donald R. Carter; Grace Christian School and its Operator Mr. Robert Durham; Bethany Church School and its Operator Reverend Gene Woodall; Tabernacle Christian School Day Care and its Operator Mr. Randall Shook; South Park Baptist School and its Operator Mr. Daniel D. Carr; Gospel Light Baptist Church and its Operator Reverend Gary Blackburn; Friendship Christian Schools and its Operator Mr. Charles Stanley; and All Others Similarly Situated

FILED FEB. 1, 1980
In The Office of Clerk Supreme Court
of North Carolina

Defendants appeal from the orders of Judge Donald L. Smith entered 11 December 1978 in Wake Superior Court, overruling defendants' motion to dismiss and granting plaintiffs' motion for a preliminary injunction. The Court of Appeals affirmed on 4 September 1979. 42 N.C. App. 665 (1979). Defendants appeal to this Court pursuant to G.S. 7A-30(1)

(appeal as of right from a decision directly involving a substantial constitutional question). On 20 September 1979 we also allowed defendants' petition for discretionary review under G.S. 7A-31 and granted defendants' petition for writ of supersedeas pending determination of the matter.

Rufus L. Edmisten, Attorney General, by Andrew A. Vanore, Jr., Senior Deputy Attorney General, and Ann Reed, Special Deputy Attorney General, for the state.

Strickland & Fuller, by Thomas E. Strickland, and Lake & Nelson, P. A. by I. Beverly Lake, Jr., and I. Beverly Lake, for defendant appellants.

EXUM, Justice.

This is a suit brought by the state for declaratory and injunctive relief against the class represented by the individually named defendants and "all others similarly situated." The state seeks a declaration that the defendants, church operated day-care centers and their administrators, are subject to the provisions of the Day Care Facilities Act of 1977 (Act), G.S. 110-85 *et seq.*, and prays for an injunction restraining defendants from operating any day-care facilities until such time as they shall, pursuant to the Act, obtain day-care licenses from the North Carolina Child Day-Care Licensing Commission. Defendants appeal from (1) the superior court's denial of their motion to dismiss, and (2) the superior court's granting of the state's motion for a preliminary injunction.

Upon a careful review of the record and oral arguments, we conclude that both the denial of defendants' motion to dismiss and the granting of the preliminary injunction constitute non-appealable interlocutory orders. Defendants' purported appeal, therefore should be dismissed and the Court of Appeals' opinion vacated. Accordingly, we dissolve our writ of super-

sedeas and remand the case to the superior court for further proceedings.

At the center of this controversy is the scope of the state's constitutional power to regulate certain aspects of the operation of child day-care centers by churches and religious organizations. The Act in question establishes under the Department of Administration the Child Day-Care Licensing Commission and provides for mandatory annual licensing by the Commission of any day-care center which provides care on a regular basis for more than four hours per day for more than five children, "wherever operated and whether or not operated for profit." G.S. 110-86(3). Licenses are to be issued by the Secretary of Administration to operators of day-care facilities covered by the Act upon a showing of the facility's compliance with minimal standards relating to such matters as health and sanitation, capacity for emergency medical care, physical safety, staff-child ratio, and qualifications of facility staff. G.S. 110-91, 93. The purpose of these requirements is to ensure a "comprehensive approach" to the state's protection of "the growing number of children who are placed in day-care facilities" under the supervision and care of persons other than their parents or legal guardians. G.S. 110-85.

The record discloses that all of the individually named defendants were licensed in compliance with the Act sometime prior to the initiation of this suit. By verified complaint filed 20 October 1978, the state alleges that these defendants have now "asserted their refusal to be licensed or to apply for renewal of their licenses to operate day-care facilities" in accordance with the Act. The complaint prays both for a declaration that the Act may be applied to defendants without unconstitutionally interfering with their religious freedoms and for a preliminary and a permanent injunction restraining defendants from further noncompliance with the Act's provisions. Without filing answer, defendants moved on 7 December 1978 to dismiss the complaint on several grounds. On 11 December 1978 Judge

Smith denied the motion to dismiss and allowed the state's motion for a preliminary injunction. Defendants appeal from these two orders.

I. THE MOTION TO DISMISS

Defendants assert on appeal that Judge Smith should have granted their motion to dismiss on the following grounds: (1) the Act cannot be constitutionally applied to church-operated day-care centers; (2) defendant institutions are not "day-care facilities" as defined in the Act and hence are not subject to its provisions; (3) the state has failed to obtain proper venue and the superior court lacks subject matter jurisdiction; and (4) the case has not been and cannot be properly certified as a class action. Although Judge Smith's order of 11 December 1978 rejected each of these arguments, his denial of defendants' motion with regard to ground (3), improper venue and lack of jurisdiction, and ground (4), failure to certify class action status, was specifically "without prejudice to defendants to file such additional motions as they think necessary should this action not be certified as a class action." The Court of Appeals affirmed Judge Smith's denial of the motion to dismiss and went on to hold, *inter alia,* that the challenged Act is constitutional on its face and as applied to defendants.

We note that the first two grounds asserted by defendants in support of their motion to dismiss clearly serve to attack the legal sufficiency of the state's complaint to set forth a claim upon which relief may be granted. As to these grounds, defendants' motion is properly characterized as one under G.S. 1A-1, Rule 12(b)(6). *See Sutton* v. *Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970); *Hodges* v. *Wellons,* 9 N.C. App. 152, 175 S.E. 2d 690 (1970). Ordinarily, a denial of a motion to dismiss under Rule 12(b)(6) merely serves to continue the action then pending. No final judgment is involved, and the disappointed movant is generally not deprived of any substantial right which

cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits. Thus, an adverse ruling on a Rule 12(b)(6) motion is in most cases an interlocutory order from which no direct appeal may be taken. *Consumers Power* v. *Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974); *Godley Auction Co.* v. *Myers*, 40 N.C. App. 570, 253 S.E. 2d 362 (1979). In the case before us, we find that Judge Smith's refusal to allow defendants' motion to dismiss based upon grounds (1) and (2) above did not finally determine any issue in the case or threaten to impair any right of defendants that could not be later protected. As to those grounds, then, the denial of the motion to dismiss was clearly an interlocutory order from which any purported appeal is premature. G.S. 1-277; G.S. 7A-27.[1]

---

[1]These statutes provide in pertinent part:

"§ 1-277. *Appeal from superior or district court judge.* — (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

"§ 7A-27. *Appeals of right from the courts of the trial division:*

. . . .

(b) From any final judgment of a superior court . . . appeal lies of right to the Court of Appeals.

. . . .

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from which appeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals."

Nor did Judge Smith's denial of that part of defendants' motion "to dismiss" based upon ground (3), improper venue and lack of jurisdiction, and ground (4), lack of class action certification, constitute final judgments for purposes of appellate review. With regard to ground (3), defendants argue that the state must proceed under G.S. 110-104, which provides that injunctive relief against the continuing operation of a day-care center not in compliance with the Act may be sought in the superior court of the county in which the day-care center is located.[2] Defendants point out that while the present action was instituted in the Superior Court of Wake County, ten of the eleven day-care centers named in the complaint are situated in counties other than Wake. Thus, defendants contend, the state has not obtained proper venue under section 104 of the Act; the state has no "standing" to maintain an action for injunctive relief apart from the express provisions of the statutory plan; and the Wake County Superior Court therefore lacks jurisdiction over the subject matter of the suit. We cannot agree that defendants' quarrel with venue raises an issue of jurisdiction. Matters of venue do not *per se* trigger questions of jurisdictional power. And neither the spirit and intent of the Act nor section 104 permit, much less compel, a conclusion that the Act is intended to restrict the general statewide jurisdiction

---

[2]G.S. 110-104 reads in its entirety:

"*Injunctive relief.* – The Secretary or his designee is empowered to seek injunctive relief in the superior court of the county in which a day-care center is located against the continuing operation of that day-care facility at any time, whether or not any administrative proceedings are pending. The superior court may grant injunctive relief, temporary, preliminary or permanent when there is any violation of this Article, or of the rules and regulations promulgated by the Commission, which threatens serious harm to children in the day-care facility or when a final order to deny or revoke a license has been violated or when a day-care facility is operating without a license."

of the superior court or to limit the scope of relief normally available in declaratory judgment actions.[3] Defendants' motion "to dismiss" for lack of proper venue thus presents no challenge to the trial court's power to entertain the subject matter of the suit. At best, the motion serves only to question the propriety of the state's choice of Wake County as venue for the action. The motion should accordingly be treated as one to remove the action, not dismiss it. *Coats* v. *Hospital,* 264 N.C. 332, 141 S.E. 2d 490 (1965); *State ex rel. Cloman* v. *Staton,* 78 N.C. 235 (1878).

It is true that an appeal from a final denial of a motion for change of venue is not premature. *Coats* v. *Hospital, supra; Klass* v. *Hayes,* 29 N.C. App. 658, 225 S.E. 2d 612 (1976). In the instant case, however, the trial court's rejection of defendants' contentions both as to improper venue and failure to certify class action status was specifically without prejudice to defendants' right to file additional motions should class action certification ultimately be denied. Judge Smith's order in this regard was clearly tentative. He, in effect, postponed his ultimate response to the merits of both the venue and class action arguments raised by defendants. There is not the slightest suggestion in the record that defendants suffered any impairment of a substantial right by Judge Smith's interlocutory deferral of action. The order denying defendants' motion to dismiss on grounds (3) and (4) was thus not immediately appealable.

---

[3]The mere existence of an alternate adequate remedy will not be held to bar an appropriate action for declaratory judgment. *See* G.S. 1A-1, Rule 57. And in many cases a preliminary injunction to maintain the *status quo* of the parties may be an appropriate form of interim relief ancillary to a pending suit for declaratory judgment. *See* 26 C.J.S. *Declaratory Judgments* § 111b and cases cited therein; *see, e.g., Campbell v. Church,* 19 N.C. App. 343, 199 S.E. 2d 34, *cert. denied,* 284 N.C. 252, 200 S.E. 2d 652 (1973).

II. THE PRELIMINARY INJUNCTION

A similar analysis applies to defendants' appeal from Judge Smith's order granting the state's motion for a preliminary injunction. The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. If no such right is endangered, the appeal cannot be maintained. G.S. 1-277; *Pruitt* v. *Williams,* 288 N.C. 368, 218 S.E. 2d 348 (1975).

In the instant case, the order appealed from restrains defendants from operating day-care centers without complying with the licensing requirements of the Act. Since defendants have all held valid licenses in the past, the order serves only to ensure that they continue their previous compliance pending disposition of the case on its merits. Defendants offer no evidence of any substantial right which will be irrevocably lost if the state's entitlement to the preliminary injunction is not now reviewed. Their contention that further compliance with the Act's requirements violates their constitutionally guaranteed religious freedoms goes to the heart of their legal challenge to the application of the Act itself and must await resolution at the final hearing when all the facts upon which such resolution must rest can be fully developed. *Milk Commission* v. *Dagenhardt,* 261 N.C. 281, 134 S.E. 2d 361 (1964); *Carbide Corp.* v. *Davis,* 253 N.C. 324, 116 S.E. 2d 792 (1960). Under the

facts of this case, defendants have no right to appeal from the order granting the preliminary injunction.

Our refusal to allow defendants' appeal is not a surrender to technical requirements of finality. The statutes and rules governing appellate review are more than procedural niceties. They are designed to streamline the judicial process, to forestall delay rather than engender it. "There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veasey* v. *Durham,* 231 N.C. 357, 363, 57 S.E. 2d 377, 382 (1950). Where, as here, a party seeks on no more than pleadings and affidavits to challenge the constitutionality of a statute, not on its face but as applied to that party, and pursues that challenge by attempting to appeal from an interlocutory order, an appellate court should be especially mindful of the dangers inherent in the premature exercise of its jurisdiction.

These considerations are particularly relevant in the context of the case before us. Defendants do not challenge the Act on its face. They strenuously argue, however, that the Act *cannot apply to them* without exceeding the bounds of certain constitutional limitations. More specifically, they contend that the operation of each day-care center is an integral part of the ministry of its supporting church and that the mandatory state licensing of the facilities violates the free exercise of their religion. With the exception of defendants' own affidavits, however, there is nothing in the record to guide the inquiry of this Court or of any other judicial tribunal into the degree to which defendants' day-care services are in face religious activities warranting special constitutional protection. Nor does the record reveal any factual basis, save that suggested by general statements in the pleadings, upon which to determine the extent to which the Act's regulations do in fact interfere with defendants' allegedly religious conduct. In short, defendants' assertions in their affidavits have not been tested by cross-examination; their

allegations have not been buttressed by the introduction of evidence; and there has been no resolution of the factual issues upon which defendants' constitutional claims are grounded.[4] Yet the validity of their constitutional argument can be measured on appeal only against a fully developed factual record which clearly delineates the nature and scope of the unconstitutional intrusion which defendants assert arises from the burden imposed by the Act. Such a record is essential to the proper determination of the constitutional infirmities, if any, of a statute's application to a particular situation. Absent such a record, our intervention is necessarily premature. This Court will pass upon the constitutionality of a statute *only when* the issue is squarely presented upon an adequate factual record and *only when* resolution of the issue is necessary to determine the rights of the parties before it. *Nicholson* v. *Education Assistance Authority,* 275 N.C. 439, 447, 168 S.E. 2d 401, 406 (1969); *Carbide Corp.* v. *Davis, supra,* 253 N.C. at 327, 116 S.E. 2d at 794.

Where an appealing party has no right to appeal, an appellate court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves. *Waters* v. *Personnel, Inc.,* 294 N.C. 200, 240 S.E. 2d 338 (1978). We decline in this case to exercise our general supervisory power to consider the matters raised by the attempted appeals, *see, e.g., Consumers Power* v. *Power Co., supra,* 285 N.C. 434, 206 S.E. 2d 178, and accordingly dismiss the appeals *ex mero motu.* The decision of the Court of Appeals is vacated and the writ of supersedeas issued by this Court is hereby dissolved. Nothing expressed herein should be construed as an expression of our own opinion on the con-

---

[4]The trial court made no findings, nor would it have been appropriate for it to have done so, on those points which are central to defendants' claims on the merits. Such findings must await the final hearing and be based on evidence appropriately adduced at that time.

stitutional issues attempted to be raised by defendants. The case is remanded to the Court of Appeals to be further remanded to the superior court for further proceedings.

VACATED and REMANDED.

NO. 125

TENTH DISTRICT – WAKE COUNTY

SUPREME COURT OF NORTH CAROLINA

Fall Term 1979

STATE OF NORTH CAROLINA
v.
CHRISTIAN SCHOOL, ET AL.

O R D E R

FILED FEBRUARY 20, 10:34 A.M., '80
IN THE OFFICE OF CLERK SUPREME COURT
OF NORTH CAROLINA

Defendants' petition for rehearing filed in this cause on 12 February 1980 is allowed as follows:

(1) Defendants are allowed 10 days from this date within which to file briefs[1] addressing the following questions:

a. The appealability of the order of the trial court granting preliminary injunction.

b. Whether defendants' constitutional defenses will become moot if they obtain licenses pursuant to the preliminary injunction to operate pending the litigation.

(2) Plaintiffs are allowed 10 days after the date defendants file their brief to file an additional brief.

(3) Certification of the opinion of this court filed on 1

[1]Briefs need not be printed. Eight reproduced copies will be acceptable.

February 1980 will be withheld pending further consideration of this cause.

It is further ordered that the writ of supersedeas heretofore entered by this court is reinstated pending further consideration of this cause.

This 20 February 1980.

Brock

For the Court

The foregoing order is issued over my hand and seal of the Supreme Court this 20th day of February, 1980.

JOHN R. MORGAN
Clerk of the Supreme Court
of North Carolina

cc: Andrew A. Vanore, Jr., Special Deputy Attorney General
Ann Reed, Special Deputy Attorney General
Thomas E. Strickland, Attorney at Law
I. Beverly Lake, Attorney at Law
I. Beverly Lake, Jr., Attorney at Law

A TRUE COPY
JOHN R. MORGAN
CLERK OF THE SUPREME COURT OF NORTH CAROLINA
By TERRY E. WATKINS
DEPUTY CLERK
February 20, 1980

IN THE
SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1980

No. 138 — From Wake

The State of North Carolina, The Child Day-Care Licensing Commission of the Department of Administration and Joseph W. Grimsley, Secretary of the Department of Administration, ex rel, Rufus L. Edmisten, Attorney General of North Carolina

v.

Fayetteville Street Christian School and its Operator Mr. Bruce D. Phipps; Gospel Light Christian School and its Operator Mrs. Delories B. Yokely; Grace Christian School and its Operator Mr. Earl R. Eaton; Immanuel Day Care Center and its Operator Mrs. Elizabeth Harrell; Baptist Temple School and its Operator Mr. Donald R. Carter; Grace Christian School and its Operator Mr. Robert Durham; Bethany Church School and its Operator Reverend Gene Woodall; Tabernacle Christian School Day Care and its Operator Mr. Randall Shook; South Park Baptist School and its Operator Mr. Daniel D. Carr; Gospel Light Baptist Church and its Operator Reverend Gary Blackburn; Friendship Christian Schools and its Operator Mr. Charles Stanley; and All Others Similarly Situated

FILED APR. 8 1980
In The Office of Clerk Supreme Court
of North Carolina

On defendants' petition to rehear our decision, No. 125 Fall Term, 1979, filed 1 February 1980 and reported at 299 N.C. 351, 261 S.E. 2d 908.

Rufus L. Edmisten, Attorney General, by Andrew A. Vanore, Jr., Senior Deputy Attorney General, and Ann Reed, Special Deputy Attorney General, for the State.

Strickland & Fuller, by Thomas E. Strickland, and Lake & Nelson, P. A., by I. Beverly Lake, Jr., and I. Beverly Lake, for defendant-appellants.

PER CURIAM.

On 20 February 1980 we allowed defendants' petition for rehearing pursuant to App. Rule 31 to the extent of permitting both sides to file briefs on the questions: (1) whether the trial court's order granting plaintiffs' motion for a preliminary injunction was immediately appealable and (2) whether defendants' compliance with the injunction moots the issues raised by defendants' alleged constitutional defenses. We did not order that further arguments be held. We withheld certification of the opinion and reinstated our writ of supersedeas pending further consideration of the cause.

Having further considered the parties' briefs on the questions delineated, we are of the opinion and hold: (1) the preliminary injunction issued by the trial court was not immediately appealable and (2) defendants' compliance with the preliminary injunction does not moot the issues raised by defendants' alleged constitutional defenses.

We adhere to the reasoning and authority in our former opinion by which we determined that the preliminary injunction was not immediately appealable. Contrary to defendants' assertion in their new brief, this preliminary injunction does maintain the status quo as it existed before defendants' asserted their right to operate without state licenses and refused to obtain licenses. This assertion and refusal precipitated the state's action. The preliminary injunction serves to place the parties in the position they were before the dispute between them arose. Thus, it maintains the last peaceable status quo between

the parties just as did the preliminary injunction issued in *Pruitt* v. *Williams,* 288 N.C. 368, 218 S.E. 2d 348 (1975), relied on in our former opinion.

We did not address in our former opinion the mootness question. Clearly defendants' compliance with the preliminary injunction does not moot the issues raised by defendants' assertions of constitutional defenses to the state's action. The preliminary injunction requires defendants to comply with the statutory licensing requirements until a final determination can be made on fully developed facts of the ultimate question in the case, *i.e.*, whether the licensing statutes can be constitutionally applied to these defendants. Until such a determination is made the statutes, conceded to be facially valid, are presumably applicable to defendants and defendants must perforce comply with them.

Furthermore the state is seeking declaratory as well as injunctive relief, both preliminary and permanent. To require defendants, preliminarily and pending final judgment, to obtain licenses does not mean defendants cannot continue to assert and attempt to prove that the licensing statutes do infringe upon the free exercise of their religion. If they succeed, and if the state cannot then show a compelling state interest justifying the infringement, defendants will be entitled to a final declaratory judgment in their favor and dissolution of the preliminary injunction. The result will be that defendants will thereafter be free to operate their day-care centers without state licenses. If, of course, defendants fail in their initial burden, or succeeding in it, the state demonstrates a compelling state interest justifying the licensing scheme, the state will be entitled to a final declaratory judgment and a permanent injunction in its favor. See *Shubert* v. *Verner,* 374 U.S. 398, 406-07 (1963); see generally, Tribe, *American Constitutional Law* § 14-10 (1978).

Defendants argue that they might prefer to close their schools rather than comply with the preliminary injunction. Such action would moot the case for it would amount to defendants'

surrender of their legal position and an end to the controversy. There would be nothing left to adjudicate. Defendants may choose this course. The preliminary injunction does not require them to do so. There is, as we have noted, much at stake in the cause between the parties even after defendants comply with the preliminary injunction.

The former opinion and decision of the Court remains the Court's opinion and decision. It shall be certified with this *per curiam* opinion. The decision of the Court of Appeals, consequently, is vacated and the writ of supersedeas issued by this Court is hereby dissolved. The case is remanded to the Court of Appeals to be further remanded to the superior court for further proceedings.

VACATED and REMANDED.

NORTH CAROLINA COURT OF APPEALS

NO. 7910SC230

Filed: 4 September 1979

WAKE COUNTY

No. 78CVS5292

THE STATE OF NORTH CAROLINA, THE CHILD DAY-CARE LICENSING COMMISSION OF THE DEPARTMENT OF ADMINISTRATION and JOSEPH W. GRIMSLEY, Secretary of the Department of Administration, EX REL, RUFUS L. EDMISTEN, Attorney General of North Carolina

v.

FAYETTEVILLE STREET CHRISTIAN SCHOOL and its Operator MR. BRUCE D. PHIPPS; GOSPEL LIGHT CHRISTIAN SCHOOL and its Operator MRS. DELORES B. YOKELY; GRACE CHRISTIAN SCHOOL and its Operator MR. EARL R. EATON; IMMANUEL DAY CARE CENTER and its Operator MRS. ELIZABETH HARRELL; BAPTIST TEMPLE SCHOOL and its Operator MR. DONALD R. CARTER; GRACE CHRISTIAN SCHOOL and its Operator MR. ROBERT DURHAM; BETHANY CHURCH SCHOOL and its Operator REVEREND GENE WOODALL; TABERNACLE CHRISTIAN SCHOOL DAY CARE and its Operator MR. RANDALL SHOOK; SOUTH PARK BAPTIST SCHOOL and its Operator MR. DANIEL D. CARR; GOSPEL LIGHT BAPTIST CHURCH and its Operator REVEREND GARY BLACKBURN; FRIENDSHIP CHRISTIAN SCHOOLS and its Operator MR. CHARLES STANLEY; and ALL OTHERS SIMILARLY SITUATED

FILED 1979 SEP. 4 A.M. 9:31
IN THE OFFICE OF CLERK COURT OF APPEALS
OF NORTH CAROLINA

Appeal by defendants from Smith (Donald L.), Judge. Orders entered 11 December 1978 in Superior Court, Wake County. Heard in the Court of Appeals 29 June 1979.

This action was instituted in Wake County on 20 October 1978 by the State of North Carolina and the Child Day-Care Licensing Commission of the Department of Administration (hereinafter referred to as the Commission) seeking a declaratory judgment relating to the plaintiffs' authority to require defendants, church operated day-care centers, to be licensed by the Commission pursuant to G.S., Chap. 110, Art. 7, G.S., Chap. 143B, Art. 9 (Part 4), and the rules and regulations promulgated thereunder by the Commission.

The named defendants are church operated day-care centers and their directors who have either refused to renew their expired licenses, or who have returned their expired licenses, and who have asserted their refusal to be licensed by plaintiff, although they have agreed to make available to plaintiffs evidence that they are complying with fire, health, and safety regulations.

In addition to the named defendants, plaintiffs bring this action against the class of all persons similarly situated; namely, church owned day-care facilities which continue to operate but which have refused to remain licensed by plaintiffs and have denied plaintiffs' authority to regulate them in any manner whatsoever. Plaintiffs also seek preliminary and permanent injunctions enjoining defendants and all others similarly situated from operating any day-care facility without having obtained a license from plaintiff Commission.

The named defendants moved to dismiss the action on the grounds that: (1) the licensing statutes are unconstitutional if they purport to authorize plaintiffs to license church owned day-care facilities; (2) there is no justiciable controversy; (3) church owned day-care centers are excepted from the licensing requirements by G.S. 110-86(3); (4) the plaintiffs have failed to obtain proper venue and jurisdiction for injunctive relief against those defendants not located in Wake County; and (5) this action is not an appropriate class action, because defend-

ants do not adequately represent the class, and plaintiffs have failed to exhaust administrative remedies.

Plaintiffs filed affidavits of the Secretary of Administration, the Director and the Assistant Director of the Office of Child Day-Care Licensing in the Department of Administration, the Licensing Supervisor for the Office of Child Day-Care Licensing, the Head of the Sanitation Branch, Division of Health Services in the Department of Human Resources, and the Code Consultant Supervisor for the Engineering and Building Codes Division of the Department of Insurance, stating that the day-care licensing requirements speak only to minimum standards of health and safety and do not interfere with any religious practice or contain any educational requirements for staff or children.

Defendants filed an affidavit signed by each of their directors stating that the operation of their day-care centers is part of the ministry of their churches, that the activities of the centers are not compartmentalized into religious and secular components, and that to require licensing by the State would seriously violate defendants' religious liberty. Defendants also filed affidavits of various sanitation and fire inspectors, stating that the various day-care centers operated by defendants were in satisfactory condition.

The court entered an order denying defendants' motion to dismiss on each ground asserted by defendants with leave to defendants to file additional motions should the action not be certified as a class action.

As to plaintiffs' request for a preliminary injunction, the court entered an order granting the injunction. The order provided in part as follows:

"Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Commission is required by Article 7 of Chapter 110 of the General Statutes to regulate and supervise all day-care facilities within the State to the end that all such facilities shall be licensed. Refusal of the defendants to be licensed prevents the Commission from fulfilling its responsibilities and constitutes irreparable injury to the people of North Carolina.

EXCEPTION No. 11

2. Because the defendants have been licensed as day-care facilities in the past, it does not appear that any harm or injury will befall them by requiring them to be licensed as day-care facilities pending a final determination of the rights of the parties.

EXCEPTION No. 13

3. It appears that plaintiffs will succeed on the merits. The State has an undoubted right to regulate day-care facilities to protect the health and safety of the children in care.

EXCEPTION No. 15

BASED UPON THE FOREGOING, it is ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for a preliminary injunction be and the same is hereby granted and the named defendants, their agents, servants, employees, members or (D. L. S.) anyone else acting by, under through or in concert with them are hereby enjoined from opening or operating any day-care facilities until such time as they have complied with Article 7 of Chapter 110 of the General Statutes and 1 NCAC 16."

This Court stayed the preliminary injunction pending appeal. Defendants appealed.

Attorney General Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr. and Special Deputy Attorney General Ann Reed, for the State.

Strickland & Fuller, by Thomas E. Strickland; and Lake & Nelson, by I. Beverly Lake, Jr., for defendant appellants.

ERWIN, Judge.

Ten assignments of error appear in the record. Defendants bring nine of them forward on appeal in seven arguments.

After careful consideration of each of the assignments of error in the record before us, we conclude that the orders entered by the trial court were proper in all respects and affirm both orders.

CONSTITUTIONAL QUESTION

Defendants contend that application of the licensing requirements of the Day-Care Facilities Act of 1977 to their day-care centers amounts to State prohibition of the free exercise of religion and is therefore unconstitutional. We do not agree.

The Act in question provides in part:

"§ 110-88. *Powers and duties of the Commission.*—The Commission shall have the following powers and duties:

(1) To develop policies and procedures for the issuance of a license to any day-care facility which meets the health and safety standards established under this Article.

(2) To approve the issuance of licenses for day-care facilities based upon inspections by and written reports from existing agencies of State and local government where available, or based upon inspections by and reports from personnel employed by the Commission where such services are not otherwise available.

(3) To develop a system or plan for registration of day-care plans in such form and place as shall be determined by the Commission so that day-care plans which are not subject to licensing may be identified, so that there can be an accurate census of the number of children placed in day-care resources, and so that providers of day care who do not receive the educational and consultation services related to licensing may receive educational materials or consultation through the Commission.

. . .

(5) To make rules and regulations and develop policies for implementation of this Article, including procedures for application, approval, renewal and revocation of licenses.

(6) To make rules and regulations for the issuance of a provisional license to a day-care facility which does not conform in every respect with the standards relating to health and safety established in this Article provided that the Secretary of Administration finds, and the Commission concurs in the finding that the operator is making a reasonable effort to conform to such standards, except that a provisional license shall not be issued for more than one year and shall not be renewed.

(7) To develop and promulgate standards which reflect higher levels of day care than required by the standards established by this Article, which will recognize better physical facilities, more qualified personnel, and higher quality programs. The Commission shall be empowered to issue two grades of licenses: an "A" license for compliance with the provisions of the Article, and an "AA" license for those licensees meet-

ing the voluntary higher standards promulgated by the Commission.

(8) To develop a procedure by which the Department [of Administration] shall furnish such forms as may be required for implementation of this Article.

(9) To serve as an administrative-appeal body to determine all issues related to the issuance, renewal and revocation of licenses."

At the outset, we note: (1) that the wording of the Act in question does not grant to the State any authority to interfere with the religious belief or freedom of defendants; (2) that the day-care licensing requirements speak only to minimum standards of health and safety and do not interfere with any religious practices or contain any educational requirements for staff or children; (3) that all of the defendants have heretofore been licensed by the Commission without any objections; and (4) that defendants do not contend or show that it is contrary to their sincere religious belief to seek licenses.

The First Amendment of the United States Constitution, applicable to the State through the Fourteenth Amendment of the said Constitution, prevents State enactment of laws prohibiting the free exercise of religion. *Cantwell* v. *Connecticut,* 310 U.S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 A.L.R. 1352 (1940). *See Church* v. *State,* 40 N.C. App. 429, 253 S.E. 2d 473 (1979).

Defendants contend that the State may not require "a church" to obtain a license or permit from a state agency as a condition precedent to its performing a major portion of its ministry.

The State responds that despite the breadth of the First Amendment's words, defendants do not enjoy absolute freedom of religion. While their freedom to believe remains inviolate, their freedom to act is subject to reasonable regulation for the protection of society. By general and nondiscriminatory legisla-

tion, the State may reasonably safeguard the health, safety, and welfare of its citizens without violating Fourteenth Amendment liberties.

In *In re Williams*, 269 N.C. 68, 80, 152 S.E. 2d 317, 326, *cert. denied*, 388 U.S. 918, 18 L. Ed. 2d 1362, 87 S. Ct. 2137 (1967), our Supreme Court held:

> "The liberty secured by the First Amendment to the United States Constitution and by Article I, § 26, of the Constitution of North Carolina are, however, so basic and fundamental that one may not be compelled by governmental action to do that which is contrary to his religious belief in the absence of a 'compelling state interest in the regulation of a subject within the State's Constitutional power to regulate.'" (Citations omitted.)

In *Wisconsin* v. *Yoder*, 406 U.S. 205, 214, 32 L. Ed. 2d 15, 24, 92 S. Ct. 1526, 1532 (1972), the Supreme Court of the United States held:

> "It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

G.S. 110-88(1) permits the Commission "[t]o develop policies and procedures for the issuance of a license to any day-care facility which meets the health and safety standards established under this Article." The stated purpose of the Act is to protect the "physical safety and moral environment" of children who will use such facilities. G.S. 110-85(2). This is a compelling state interest in the regulation of a subject within the State's constitutional power to regulate.

The question raised by the case *sub judice* is the validity of the Act, whether the legislation on its face is in conflict with the Freedom of Religion Clause of the First Amendment. The power granted to the Child Day-Care Licensing Commission by the Act in attaining the statutory purpose must be exercised so as not to unduly infringe upon the freedom of religion. The religious beliefs of the defendants and other religious bodies may not endanger the peace, good order, and morals of society. We hold the Act to be constitutional on its face and as applied in the case at bar. The license in question does not relate to defendants' ministry in any manner, but to the condition of the physical facility. *See Roloff Evangelilstic Enterprises* v. *State,* 556 S.W. 2d 856 (Texas, Ct. App. 1977). We find no merit in this assignment of error.

Defendants contend that even if the Act is constitutional, it does not apply to defendants because of the exception in G.S. 110-86(3) for "Bible schools normally conducted during vacation periods." We do not agree.

G.S. 110-86(3) provides:

> "(3) 'Day-care facility' includes any day-care center or child-care arrangement which provides day care on a regular basis for more than four hours per day for more than five children, wherever operated and whether or not operated for profit, except that the following are not included: public schools; non-public schools whether or not accredited by the State Department of Public Instruction, which regularly and exclusively provide a course of grade school instruction to children who are of public school age; summer camps having children in full-time residence; summer day camps; and Bible schools normally conducted during vacation periods."

To us, the record is clear that defendants provide care away from home on a regular basis for more than four hours per

day for more than five children less than thirteen years of age. The operations of defendants are year around and are not vacation Bible schools. Defendants' operations are not temporary in nature. This assignment of error is overruled.

VENUE

G.S. 110-104 provides:

> "*Injunctive relief.* — The Secretary or his designee is empowered to seek injunctive relief in the superior court of the county in which a day-care center is located against the continuing operation of that day-care facility at any time, whether or not any administrative proceedings are pending. The superior court may grant injunctive relief, temporary, preliminary or permanent when there is any violation of this Article, or of the rules and regulations promulgated by the Commission, which threatens serious harm to children in the day-care facility or when a final order to deny or revoke a license has been violated or when a day-care facility is operating without a license."

Defendants contend that the above statute requires an action to enjoin the operation of a day-care facility on the ground that it is operating without a license be brought in the county wherein the facility is located. Defendants are located in several counties throughout the State, and this action was brought in Wake County; therefore, the trial court only had jurisdiction over the Wake County defendants.

Plaintiffs elected to pursue the remedy of declaratory relief provided for by Article 26 of Chapter 1 of the General Statutes to test the licensing issue. Plaintiffs sought injunctive relief as an adjunct to the declaratory relief in order to maintain the status quo of compliance with the present statute.

This action was brought in Wake County. Defendants have not shown how they have been prejudiced thereby. Venue is

not jurisdictional. *Miller* v. *Miller,* 38 N.C. App. 95, 247 S.E. 2d 278 (1978); 13 Strong's N.C. Index 3d, Venue, § 1, p. 269.

We hold that Wake County is the proper venue for this declaratory judgment action and that the plaintiffs' motion for preliminary injunction was properly granted. We find no error.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants contend that the trial court's findings of fact and conclusions of law in the preliminary injunction order do not support the order, particularly Findings of Fact Nos. 2, 27, and 33. The findings of fact in question read:

> "2. The Child Day-Care Licensing Commission (hereinafter Commission) is an agency of the State of North Carolina and has been vested by the General Assembly of North Carolina with the responsibility and authority of regulating and supervising all day-care facilities within the State to the end that all such day-care facilities shall be licensed.
>
> EXCEPTION No. 7
>
> * * *
>
> 27. Pursuant to and in conformity with the duties and responsibilities imposed upon it by the provisions of Article 7 of Chapter 110 of the General Statues [*sic*] and Part 4 of Article 9 of Chapter 143B of the General Statutes, the Commission has promulgated regulations codified at 1 NCAC 16, which along with the requirements set by the General Assembly in Article 7 of Chapter 110 of the General Statutes establish minimum standards which must be met by all day-care facilities. In order to ascertain whether these minimum standards have been met, the Commission, as a part of these regulations, requires all day-care facilities to submit an annual application to the Commission, and requires inspections of the facilities by State and local agencies to determine com-

pliance with certain health and safety requirements.

EXCEPTION No. 8

* * *

33. The defendants' failure to comply with the plaintiffs' requirements in this area prevents the plaintiffs from carrying out the duties and responsibilities imposed upon them by Article 7 of Chapter 110 of the General Statues [*sic*] and Part 4 of Article 9 of Chapter 143B of the General Statutes.

EXCEPTION No. 10"

Defendants argue that the foregoing findings are erroneous and in direct conflict with G.S. 110-86(3) which specifically excludes the defendants from the operation of the statute. We have rejected this contention of the defendants and have concluded that defendants are not exempted from the Act. We find no error in the court's findings of fact.

Our Supreme Court held in *Conference* v. *Creech* and *Teasley* v. *Creech and Miles,* 256 N.C. 128, 139-40, 123 S.E. 2d 619, 626-27 (1962):

"Ordinarily a temporary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiffs' right until the controversy between him and defendant can be determined. *Edmonds* v. *Hall,* 236 N.C. 153, 72 S.E. 2d 221.

It ordinarily lies in the sound discretion of the court to determine whether or not a temporary injunction will be granted on hearing pleadings and affidavits only. In the exercise of such discretion the court should consider the inconvenience and damage to defendant as well as the benefit that

will accrue to the plaintiff. *Service Co.* v. *Shelby, supra; Lance* v. *Cogdill,* 238 N.C. 500, 78 S.E. 2d 319; *Huskins* v. *Hospital,* 238 N.C. 357, 78 S.E. 2d 116.

On appeal we are not bound by the findings or ruling of the court below in injunction cases, but may review the evidence on appeal. 'Even so, there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error.' *Lance* v. *Cogdill, supra.*"

After complete examination of the whole record before us, we are compelled to affirm both orders entered by the trial court. The record reveals there is probable cause to believe the plaintiffs can establish the rights they assert; and there exists a reasonable apprehension of irreparable loss unless the relief is granted. Plaintiffs have statutory obligations to enforce.

CLASS ACTION

The trial court entered the following ruling on defendants' motion to dismiss: "Defendants' motion to dismiss for reason that the action has not been certified as a class action is hereby denied without prejudice to defendants to file such additional motions as they think are necessary should this action not be certified as a class action." We hold the issue of a class action has not been determined by the trial court and therefore not before us. The trial court will be governed by G.S. 1A-1, Rule 23, of the Rules of Civil Procedure in ruling on this issue.

CONCLUSION

Plaintiffs have stated a claim upon which relief may be granted.

The orders entered by the trial court are in all respects proper and are affirmed.

The stay order heretofore entered by this Court is dissolved herewith.

Orders affirmed.

Judges CLARK and MITCHELL concur.

Judge MITCHELL concurred in this opinion on 17 August 1979 prior to his resignation from the Court on 20 August 1979.

A TRUE COPY
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA
By PATTIE P. BARBER
DEPUTY CLERK
September 5, 1979.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
78CVS5292

NORTH CAROLINA – WAKE COUNTY

THE STATE OF NORTH CAROLINA, ET AL,
Plaintiffs

v.

FAYETTEVILLE STREET CHRISTIAN SCHOOL, ET AL,
Defendants

FILED – 1978 Dec. 11 P.M. 3:49
RUSSELL NIPPER
CLERK OF SUPERIOR COURT
WAKE COUNTY, N. C.
By.....

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

On October 20, 1978, the Child Day-Care Licensing Commission of the Department of Administration and Joseph W. Grimsley, Secretary of Administration, by and through the Attorney General, filed this action against 11 church-operated day-care facilities, the chief administrative officers (operators) of these day-care facilities, and all others similarly situated. The plaintiffs seek a declaration of the extent of their right to regulate by licensing day-care facilities, together with a preliminary and permanent injunction enjoining the defendants from operating any day-care facilities until such time as they shall have obtained valid day-care licenses. The matter now before the Court is plaintiffs' request for a preliminary injunction. The matter was heard at a special session of the Wake County Superior Court on December 8, 1978.

The Court considered the pleadings, affidavits and arguments of counsel, and makes the following:

FINDINGS OF FACT

1. The State of North Carolina is a sovereign State. Among its responsibilities is the responsibility to protect the growing number of children who are placed in day-care facilities outside their own homes. It is also the responsibility of the State to protect the religious freedoms of its citizens. These responsibilities are not inconsistent.

2. The Child Day-Care Licensing Commission (hereinafter Commission) is an agency of the State of North Carolina and has been vested by the General Assembly of North Carolina with the responsibility and authority of regulating and supervising all day-care facilities within the State to the end that all such day-care facilities shall be licensed.

3. Joseph W. Grimsley is the duly appointed Secretary of the North Carolina Department of Administration (hereinafter Secretary). As Secretary, Mr. Grimsley is the head of the Department of Administration and is charged with the duty and responsibility of administering the licensing program of day-care facilities and enforcing the rules and regulations promulgated by the Commission.

4. This action is brought for and on behalf of the State of North Carolina, the Commission and the Secretary by the Attorney General of North Carolina pursuant to the authority of G.S. 114-2.

5. Fayetteville Street Christian School is an unincorporated association having its principal office at 901 North Fayetteville Street, Asheboro, in the County of Randolph, North Carolina. As an unincorporated association, Fayetteville Street Christian School has the capacity to sue and be sued in its own name. Fayetteville Street Christian School is a day-care facility.

6. Mr. Bruce D. Phipps is the Operator of Fayetteville Street

Christian School, and as such is the person with the authority and responsibility for the operation and actions of Fayetteville Street Christian School. Mr. Phipps is a citizen of North Carolina and a resident of Asheboro, in the County of Randolph, North Carolina.

7. Gospel Light Christian School is an unincorporated association having its principal office at P. O. Box 38, Walkertown, in the County of Forsyth, North Carolina. As an unincorporated association, Gospel Light Christian School has the capacity to sue and be sued in its own name. Gospel Light Christian School is a day-care facility.

8. Mrs. Delores B. Yokely is the Operator of Gospel Light Christian School, and as such is the person with the authority and responsibility for the operation and actions of Gospel Light Christian School. Mrs. Yokely is a citizen of North Carolina and a resident of Walkertown, in the County of Forsyth, North Carolina.

9. Grace Christian School is an unincorporated association having its principal office at Route 3, Box 300, Lexington, in the County of Davidson, North Carolina. As an unincorporated association, Grace Christian School has the capacity to sue and be sued in its own name. Grace Christian School is a day-care facility.

10. Mr. Earl R. Eaton is the Operator of Grace Christian School, and as such is the person with the authority and responsibility for the operation and actions of Grace Christian School. Mr. Eaton is a citizen of North Carolina and a resident of Lexington, in the County of Davidson, North Carolina.

11. Immanuel Day Care Center is an unincorporated association having its principal office at Box 10, Edenton, in the County of Chowan. As an unincorporated association, Immanuel Day Care Center has the capacity to sue and be sued in its own name. Immanuel Day Care Center is a day-care facility.

12. Mrs. Elizabeth Harrell is the Operator of Immanuel Day

Care Center, and as such is the person with the authority and responsibility for the operation and actions of Immanuel Day Care Center. Mrs. Harrell is a citizen of North Carolina and a resident of Edenton, in the County of Chowan, North Carolina.

13. Baptist Temple School is an unincorporated association having its principal office at P. O. Box 2659, Burlington, in the County of Alamance, North Carolina. As an unincorporated association, Baptist Temple School has the capacity to sue and be sued in its own name. Baptist Temple School is a day-care facility.

14. Mr. Donald R. Carter is the Operator of Baptist Temple School, and as such is the person with the authority and responsibility for the operation and actions of Baptist Temple School. Mr. Carter is a citizen of North Carolina and a resident of Burlington, in the County of Alamance, North Carolina.

15. Grace Christian School is an unincorporated association having its principal office at 509 Kingston Avenue, Rocky Mount, in the County of Nash, North Carolina. As an unincorporated association, Grace Christian School has the capacity to sue and be sued in its own name. Grace Christian School is a day-care facility.

16. Mr. Robert Durham is the Operator of Grace Christian School, and as such is the person with the authority and responsibility for the operation and actions of Grace Christian School. Mr. Durham is a citizen of North Carolina and a resident of Rocky Mount, in the County of Nash, North Carolina.

17. Bethany Church School is an unincorporated association having its principal office at Route 7, Box 304, Concord, in the County of Cabarrus, North Carolina. As an unincorporated association, Bethany Church School has the capacity to sue and be sued in its own name. Bethany Church School is a day-care facility.

18. Reverend Gene Woodall is the Operator of Bethany

Church School, and as such is the person with the authority and responsibility for the operation and actions of Bethany Church School. Reverend Woodall is a citizen of North Carolina and a resident of Concord, in the County of Cabarrus, North Carolina.

19. Tabernacle Christian School Day Care is an unincorporated association having its principal office at Route 6, Box 1375, Hickory, in the County of Catawba, North Carolina. As an unincorporated association, Tabernacle Christian School Day Care has the capacity to sue and be sued in its own name. Tabernacle Christian School Day Care is a day-care facility.

20. Mr. Randall Shook is the Operator of Tabernacle Christian School Day Care, and as such is the person with the authority and responsibility for the operation and actions of Tabernacle Christian School Day Care. Mr. Shook is a citizen of North Carolina and a resident of Hickory, in the County of Catawba, North Carolina.

21. South Park Baptist School is an unincorporated association having its principal office at 2925 South Main Street, Winston-Salem, in the County of Forsyth, North Carolina. As an unincorporated association, South Park Baptist School has the capacity to sue and be sued in its own name. South Park Baptist School is a day-care facility.

22. Mr. Daniel D. Carr is the Operator of South Park Baptist School, and as such is the person with the authority and responsibility for the operation and actions of South Park Baptist School. Mr. Carr is a citizen of North Carolina and a resident of Winston-Salem, in the County of Forsyth, North Carolina.

23. Gospel Light Baptist Church is an unincorporated association having its principal office at Route 14, Box 391-E, Salisbury, in the County of Rowan, North Carolina. As an unincorporated association, Gospel Light Baptist Church has the capacity to sue and be sued in its own name. Gospel Light Baptist Church is a day-care facility.

24. Reverend Gary Blackburn is the Operator of Gospel Light Baptist Church, and as such is the person with the authority and responsibility for the operation and actions of Gospel Light Baptist Church. Reverend Blackburn is a citizen of North Carolina and a resident of Salisbury, in the County of Rowan, North Carolina.

25. Friendship Christian Schools is an unincorporated association having its principal office at 5510 Falls of Neuse Road, Raleigh, in the County of Wake, North Carolina. As an unincorporated association, Friendship Christian Schools has the capacity to sue and be sued in its own name. Friendship Christian Schools is a day-care facility.

26. Mr. Charles Stanley is the Operator of Friendship Christian Schools, and as such is the person with the authority and responsibility for the operation and actions of Friendship Christian Schools. Mr. Stanley is a citizen of North Carolina and a resident of Raleigh, in the County of Wake, North Carolina.

27. Pursuant to and in conformity with the duties and responsibilities imposed upon it by the provisions of Article 7 of Chapter 110 of the General Statutes and Part 4 of Article 9 of Chapter 143B of the General Statutes, the Commission has promulgated regulations codified at 1 NCAC 16, which along with the requirements set by the General Assembly in Article 7 of Chapter 110 of the General Statutes establish minimum standards which must be met by all day-care facilities. In order to ascertain whether these minimum standards have been met, the Commission, as a part of these regulations, requires all day-care facilities to submit an annual application to the Commission, and requires inspections of the facilities by State and local agencies to determine compliance with certain health and safety requirements.

28. The named defendants Gospel Light Christian School and Mrs. Delores B. Yokely, Grace Christian School and Mr. Earl R. Eaton, Baptist Temple School and Mr. Donald R. Carter, and Bethany Church School and Reverend Gene

Woodall have refused or failed to file the application which the Commission requires to be submitted for renewal of their licenses. The licenses held by these defendants expired September 1, 1978.

29. The named defendants Tabernacle Christian School Day Care and Mr. Randall Shook, and Grace Christian School and Mr. Billy Keith have refused or failed to file the application which the Commission requires to be submitted for renewal of their licenses. The licenses held by these defendants expired August 1, 1978.

30. The named defendants Gospel Light Baptist Church and Reverend Gary Blackburn refused or failed to file the application which the Commission requires to be submitted for renewal of their license. The license held by these defendants expired June 1, 1978.

31. The named defendants Fayetteville Street Christian School and Mr. Bruce D. Phipps, Immanuel Day Care Center and Mrs. Elizabeth Harrell, South Park Baptist Church and Mr. Daniel D. Carr, and Friendship Christian Schools and Mr. Charles Stanley have returned their day-care licenses to the Commission and stated that they refuse to be licensed as day-care facilities. The license of the named defendants Fayetteville Street Christian School and Mr. Bruce D. Phipps would have expired March 1, 1979. The license of the named defendants Immanuel Day Care Center and Mrs. Elizabeth Harrell would have expired May 1, 1979. The license of the named defendants South Park Baptist School and Mr. Daniel D. Carr would have expired November 1, 1978. The license of the named defendant Friendship Christian Schools and Mr. Charles Stanley would have expired June 1, 1979.

32. All named defendants, either individually or by and through duly authorized agents or representatives, have asserted their refusal to be licensed or to apply for renewal of their licenses to operate day-care facilities although they have agreed to make available "evidence that they are complying with fire,

health and safety regulations." They have also stated that they will, in the future, refuse to comply with the plaintiffs' requirements in this area, and will take whatever action is necessary to avoid compliance with the plaintiffs' regulations in this area.

33. The defendants' failure to comply with the plaintiffs' requirements in this area prevents the plaintiffs from carrying out the duties and responsibilities imposed upon them by Article 7 of Chapter 110 of the General Statutes and Part 4 or Article 9 of Chapter 143B of the General Statutes.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Commission is required by Article 7 of Chapter 110 of the General Statutes to regulate and supervise all day-care facilities within the State to the end that all such facilities shall be licensed. Refusal of the defendants to be licensed prevents the Commission from fulfilling its responsibilities and constitutes irreparable injury to the people of North Carolina.

2. Because the defendants have been licensed as day-care facilities in the past, it does not appear that any harm or injury will befall them by requiring them to be licensed as day-care facilities pending a final determination of the rights of the parties.

3. It appears that plaintiffs will succeed on the merits. The State has an undoubted right to regulate day-care facilities to protect the health and safety of the children in care.

Based Upon The Foregoing, it is Ordered, Adjudged And Decreed that plaintiffs' motion for a preliminary injunction be and the same is hereby granted and the named defendants, their agents, servants, employees, members or (D. L. S) anyone else acting by, under, through or in concert with them are hereby enjoined from opening or operating any day-care fa-

cilities until such time as they have complied with Article 7 of Chapter 110 of the General Statutes and 1 NCAC 16.

This the 11th day of December, 1978.

DONALD L. SMITH
Judge of Superior Court

A TRUE COPY
CLERK OF SUPERIOR COURT
WAKE COUNTY
By ARDEN RON
DEPUTY, CLERK SUPERIOR COURT

IN THE
SUPREME COURT OF NORTH CAROLINA

Fall Term 1979 — No. 125

THE STATE OF NORTH CAROLINA, THE CHILD DAY-CARE LICENSING COMMISSION OF THE DEPARTMENT OF ADMINISTRATION and JOSEPH W. GRIMSLEY, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION, EX REL, RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA

v.

FAYETTEVILLE STREET CHRISTIAN SCHOOL and its Operator, MR. BRUCE D. PHIPPS; GOSPEL LIGHT CHRISTIAN SCHOOL and its Operator, MRS. DELORES B. YOKELY; GRACE CHRISTIAN SCHOOL and its Operator, MR. EARL R. EATON; IMMANUEL DAY CARE CENTER, and its Operator, MRS. ELIZABETH HARRELL; BAPTIST TEMPLE SCHOOL and its Operator, MR. DONALD R. CARTER; GRACE CHRISTIAN SCHOOL and its Operator, MR. ROBERT DURHAM; BETHANY CHURCH SCHOOL and its Operator, REVEREND GENE WOODALL; TABERNACLE CHRISTIAN DAY CARE and its Operator, MR. RANDALL SHOOK; SOUTH PARK BAPTIST SCHOOL and its Operator, MR. DANIEL D. CARR; GOSPEL LIGHT BAPTIST CHURCH and its Operator, REV. GARY BLACKBURN; FRIENDSHIP CHRISTIAN SCHOOLS and its Operator, MR. CHARLES STANLEY; and ALL OTHERS SIMILARLY SITUATED.

FILED JUN 19 12:31 P.M. '80
IN THE OFFICE OF CLERK SUPREME COURT
OF NORTH CAROLINA

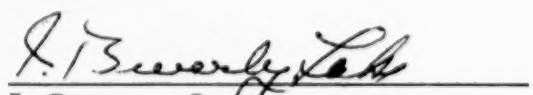
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

The Defendants, Appellants in the Supreme Court of North Carolina, hereby give notice of their appeal to the Supreme Court of the United States from the decision and judgment of the Supreme Court of North Carolina in the above entitled

action, dated 1 February 1980, certified 28 April 1980, reported in 299 N.C. 351, 261 S.E. 2d 908, reaffirmed by the said Court after rehearing, pursuant to the defendant-appellants' petition therefor, on 8 April, 1980, certified 28 April 1980, which reaffirmance is reported in 299 N.C. 731, 265 S.E. 2d 387.

This appeal to the Supreme Court of the United States is taken pursuant to 28 U.S.C. Sec. 1257(2).

This the 19th day of June, 1980.



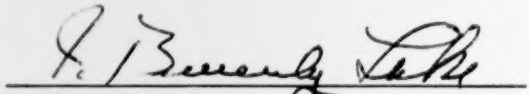
I. Beverly Lake
c/o Lake & Nelson, P. A.
P. O. Box 1306
Raleigh, North Carolina 27602
Counsel of Record for Appellants

Filed in the Supreme Court of North Carolina June 19, 1980

CERTIFICATE OF SERVICE

I, I. BEVERLY LAKE, counsel of record for the defendant-appellants and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this date I served a copy of the Notice of Appeal, hereto attached, upon the plaintiff-appellees, the only adverse parties, by depositing the same in the United States Post Office in Raleigh, North Carolina, with first class postage prepaid, addressed to Honorable Andrew Vanore, Deputy Attorney General of North Carolina, counsel of record for all of the said plaintiff-appellees, at his office in the Office of the Attorney General of North Carolina, Justice Building, Raleigh, North Carolina, 27601.

This the 19th day of June, 1980.



I. BEVERLY LAKE
c/o Lake & Nelson, P. A.
P. O. Box 1306
Raleigh, North Carolina 27602
Counsel of Record for Appellants

NORTH CAROLINA GENERAL STATUTES
CHAPTER 110

Article 7.

Day-Care Facilities.

§ 110-85. *Legislative intent and purpose.* — The General Assembly hereby declares its intent with respect to day care of children:

(1) The State should protect the growing number of children who are placed in day-care facilities or in child-care arrangements when these children are under the supervision and in the care of persons other than their parents, grandparents, guardians or full-time custodians during the day.

(2) This protection should assure that such children are cared for by persons of good moral character, that their physical safety and moral environment are protected, and that the day-care resources conform to minimum standards relating to the health and safety of the children receiving day care.

(3) This protection requires the following elements for a comprehensive approach: mandatory licensing of day-care facilities under minimum standards; promotion of higher levels of day care than required for a license through the development of higher standards which operators may comply with on a voluntary basis; registration of day-care plans which are too small to be regulated through licensing; and a program of education to help operators improve their programs and to develop public understanding of day-care needs and problems. (1971, c. 803, s. 1.)

§ 110-86. *Definitions.* — Unless the context or subject

matter otherwise requires, the terms or phrases used in this Article shall be defined as follows:

(1) "Commission" means the Child Day-Care Licensing Commission created under this Article.

(2) "Day care" includes any child-care arrangement under which a child less than 13 years of age receives care away from his own home by persons other than his parents, grandparents, guardians or full-time custodians.

(3) "Day-care facility" includes any day-care center or child-care arrangement which provides day care on a regular basis for more than four hours per day for more than five children, wherever operated and whether or not operated for profit, except that the following are not included: Public schools; nonpublic schools whether or not accredited by the State Department of Public Instruction, which regularly and exclusively provide a course of grade school instruction to children who are of public school age; summer camps having children in full-time residence; summer day camps; and Bible schools normally conducted during vacation periods.

(4) "Day-care plan" includes any day-care program or child-care arrangement where any person provides day care for more than one child and less than six children, wherever operated, and whether or not operated for profit.

(5) Repealed by Session Laws 1975, c. 879, s. 15.

(6) "License" means a license issued by the Commission to any day-care facility which meets the statutory standards established under this Article.

(7) "Operator" includes the owner, director or other person having primary responsibility for operation of a

day-care facility subject to licensing. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 4, ss. 1-3.)

§ 110-87: Repealed by Session Laws 1975, c. 879, s. 15.

§ 110-88. *Powers and duties of the Commission.* — The Commission shall have the following powers and duties:

(1) To develop policies and procedures for the issuance of a license to any day-care facility which meets the health and safety standards established under this Article.

(2) To approve the issuance of licenses for day-care facilities based upon inspections by and written reports from existing agencies of State and local government where available, or based upon inspections by and reports from personnel employed by the Commission where such services are not otherwise available.

(3) To develop a system or plan for registration of day-care plans in such form and place as shall be determined by the Commission so that day-care plans which are not subject to licensing may be identified, so that there can be an accurate census of the number of children placed in day-care resources, and so that providers of day care who do not receive the educational and consultation services related to licensing may receive educational materials or consultation through the Commission.

(4) Repealed by Session Laws 1975, c. 879, s. 15.

(5) To make rules and regulations and develop policies for implementation of this Article, including procedures for application, approval, renewal and renovation of licenses.

(6) To make rules and regulations for the issuance of a provisional license to a day-care facility which does not conform in every respect with the standards relating

to health and safety established in this Article provided that the Secretary of Administration finds, and the Commission concurs in the finding that the operator is making a reasonable effort to conform to such standards, except that a provisional license shall not be issued for more than one year and shall not be renewed.

(7) To develop and promulgate standards which reflect higher levels of day care than required by the standards established by this Article, which will recognize better physical facilities, more qualified personnel, and higher quality programs. The Commission shall be empowered to issue two grades of licenses: an "A" license for compliance with the provisions of the Article, and an "AA" license for those licensees meeting the voluntary higher standards promulgated by the Commission.

(8) To develop a procedure by which the Department [of Administration] shall furnish such forms as may be required for implementation of this Article.

(9) To serve as an administrative-appeal body to determine all issues related to the issuance, renewal and revocation of licenses.

(10) Repealed by Session Laws 1975, c. 879, s. 15. (1971, c. 803, s. 1; 1975, c. 879, s. 15.)

§ 110-89: Repealed by Session Laws 1975, c. 879, s. 15.

§ 110-90. *Powers and duties of Secretary of Administration.* — The Secretary of Administration shall have the following powers and duties under the policies, rules and regulations of the Commission:

(1) To administer the licensing program for day-care facilities and the registration system for day-care plans.

(2) To obtain and coordinate the necessary services from other State departments and units of local government

which are necessary to implement the provisions of this Article.

(3) To employ such administrative personnel and staff as may be necessary to implement this Article where required services, inspections or reports are not available from existing State agencies and units of local government.

(4) To issue a license effective for one year to any day-care facility which meets the standards established by this Article.

(5) To revoke after hearing the license of any day-care facility which ceases to meet the standards established by this Article.

(6) To prosecute or defend on behalf of the State, through the office of the Attorney General, any legal actions arising out of the administration or enforcement of this Article.

(7) To promote and coordinate educational programs and materials for operators of day-care facilities and day-care plans which are designed to improve the quality of day care available in the State, using the resources of other State and local agencies and educational institutions where appropriate.

(8) To issue a rated license when any operator of a day-care facility required to be licensed hereunder has satisfied the Commission that it has met the voluntary standards developed and adopted by the Commission. (1971, c. 803, s. 1; 1975, c. 879, s. 15.)

§ 110-90.1. *Qualification for staff in a day-care plan.* — No day-care plan shall be registered if that plan is operated by or employs any person who has been convicted of a crime involving child abuse, child neglect, or moral turpitude, or who is an habitually excessive user of alcohol or who illegally uses narcotics or other impairing drugs, or who is mentally retarded or

mentally ill to an extent that may be injurious to children. (1977, c. 1011, s. 2.)

§ 110-91. *Mandatory standards for a license.* — The following standards relating to the health and safety of children shall be complied with by all day-care facilities, except as otherwise provided in this Article. These standards shall be the only required standards for issuance of a license by the Secretary of Administration under policies and procedures of the Commission.

(1) Medical Care and Sanitation. — Each day-care facility, and all personnel, shall meet the minimum health and sanitation standards developed by the Commission for Health Services subject to adoption by the Commission not inconsistent with the provisions of this Article. The health and sanitation standards developed by the Commission for Health Services shall cover such matters as the cleanliness of floors, walls, ceilings, storage spaces, utensils, and other facilities; adequacy of ventilation; sanitation of water supply, lavatory facilities, toilet facilities, sewage disposal, food protection facilities, bactericidal treatment of eating and drinking utensils, and solid-waste storage and disposal; methods of food preparation and serving; health of staff members; and such other items and facilities as are necessary in the interest of the public health. Each year, or more often if required by the Commission in a particular case, each day-care facility shall submit evidence satisfactory to the Commission that it conforms to these health and sanitation standards.

Each child shall have a medical examination by a licensed physician or his authorized agent who is currently approved by the North Carolina Board of Medical Examiners prior to being admitted or within two weeks following admission to a day-care facility; a

record of such examination shall be on file in the records of the facility, provided, however, that no medical certificate shall be required of any child who is and has been in normal health and whose parent, guardian, or full-time custodian objects in writing to a medical examination on religious grounds which conform to the teachings and practice of any recognized church or religious denomination.

Each child shall be immunized in such manner as to meet the requirements of Articles 9 and 9A of Chapter 130 of the General Statutes.

Each day-care facility shall have a plan of emergency medical care which shall include provisions for communication with and transportation to a specified medical resource, unless otherwise previously instructed. No child receiving day care shall be administered any drug or other medication without specific instructions from a physician or the child's parent, guardian or full-time custodian. Medical information on each child in care, including the names, addresses, and telephone numbers of the child's physician and parents, legal guardian or full-time custodian shall be readily available to the staff of the day-care facility in the records of the facility in accordance with a form approved by the Commission for this purpose.

There shall be a separate bed, cot or mat for each child to use during rest periods, equipped with individual linen, except for school children who are cared for only during after-school hours; if a mat is used, it shall be of a waterproof, washable material at least two inches thick and shall be folded so that the floor side does not touch the sleeping side. Beds and linens used by members of the household of the operator shall not

be used for children receiving care in the day-care facility.

(2) Health-Related Activities. — Each child in a day-care facility shall receive a lunch which is nutritionally adequate for good health. In addition, each child shall receive refreshments or a snack in the morning and the afternoon.

Each day-care facility shall arrange for each child in care to be out-of-doors each day if weather conditions permit.

Each day-care facility shall have a rest period for each child in care after lunch or at some other appropriate time.

No day-care facility shall care for more than 25 children in one group. Facilities providing care for 26 or more children shall provide for two or more groups according to the ages of children and shall provide separate supervisory personnel for each group.

(3) Location. — Each day-care facility shall be located in an area which is free from conditions which are deemed hazardous to the physical and moral welfare of the children in care in the opinion of the Commission.

(4) Building. — Each day-care facility shall be located in a building which meets the requirements of the North Carolina Building Code under standards which shall be developed by the Building Code Council, subject to adoption by the Commission specifically for day-care facilities, including facilities operated in a private residence. Such standards shall be consistent with the provisions of this Article.

(5) Fire Prevention. — All day-care facilities shall be inspected annually by a local fire department or a volunteer fire department, using fire-prevention standards which shall be developed by the State Insurance De-

partment after consultation with local fire departments and volunteer fire departments, subject to adoption by the Commission.

(6) Space Requirements. – There shall be no less than 25 square feet of indoor space for each child for which a day-care facility is licensed, exclusive of closets, passageways, kitchens, and bathrooms, and such floor space shall provide during rest periods 200 cubic feet of airspace per child for which the facility is licensed. There shall be adequate outdoor play area for each child under rules and regulations to be adopted by the Commission which shall be related to the size and type of facility, availability and location of outside land area, except in no event shall the minimum required exceed 75 square feet per child, which area shall be protected to assure the safety of the children receiving day care by an adequate fence or other protection; provided, however, that a facility operated in a public school shall be deemed to have adequate fencing protection.

(7) Staff-Child Ratio. – In determining the staff-child ratio, children of the supervisor or other children under 13 years of age shall be included. The Commission shall adopt rules and regulations regarding staff-child ratio, provided, however, that such rules and regulations shall in no event require a ratio of staff members to children more stringent than the following:

a. For day-care facilities caring for less than 30 children, the ratios shall be as follows:

1. In facilities licensed for six to 10 children, inclusive, one full-time supervising adult with another person between the ages of 16 and 70 years, inclusive, available for emergencies in relief.

2. In facilities licensed for 11 to 20 children, in-

clusive, there must be one full-time supervising adult and one full-time staff member, one of whom may have responsibility for food preparation.

3. In facilities licensed for 21 to 29 children, inclusive, there must be one full-time supervising adult and two full-time staff members, one of whom may have responsibility for food preparation.

b. For facilities caring for 30 or more chlidren, the ratio shall be as follows:

Ages of Children	*No. of Children*	*Staff Members*
0 to 2 years	8	1
2 to 3 years	12	1
3 to 4 years	15	1
4 to 5 years	20	1
5 or more years	25	1

1. Children under two years of age in any facility must be kept separate from older children, and with a full-time adult always in attendance.
2. Staff members required to be responsible for the care of children shall not have responsibility for food preparation.

c. To provide for absenteeism and withdrawals without notice, a 20 percent (20%) tolerance shall be allowed as to groups and numbers of children specified in this section and as to the total number for which the facility is licensed, except that no more than 25 children shall be attended by one staff member.

d. Each facility may care for school age children in after-school hours up to 20 percent (20%) in excess of the number for which it is licensed. However, if there are more than 10 after-school-hour

children, an additional staff member must be present to supervise them during their hours at the facility, and there shall be no more than 25 of these children in the care of any one staff member.

(8) Qualifications for Staff. — Each day-care facility shall be under the direction or supervision of a literate person at least 21 years of age. Each staff member employed in a day-care facility supervising children shall be not less than 16 years of age, nor more than 70 years of age. No person shall be an operator of nor be employed in a day-care facility who has been convicted of a crime involving child neglect, child abuse, or moral turpitude, or who is an habitually excessive user of alcohol or who illegally uses narcotic or other impairing drugs, or who is mentally retarded or mentally ill to an extent that may be injurious to children.

(9) Records. — Each day-care facility shall keep accurate records on each child receiving care in the day-care facility in accordance with a form furnished or approved by the Commission, and shall submit attendance reports as required by the Commission.

Each day-care facility shall keep accurate records on each staff member or other person delegated responsibility for the care of children in accordance with a form approved by the Commission.

All records of any day-care facility, except financial records, shall be subject to review by the Secretary of Administration or by duly authorized representatives of the Commission or a cooperating agency who shall be designated by the Secretary.

Any effort to falsify information provided to the Commission shall be deemed by the Commission to be evidence of violation of this Article on the part of the operator or sponsor of the day-care facility and shall

constitute a cause for revoking or denying a license to such day-care facility.

(10) Each operator or staff member shall truly and honestly show each child in his care true love, devotion and tender care. (1971, c. 803, s. 1; 1973, c. 476, s. 128; 1975, c. 879, s. 15; 1977, c. 1011, s. 4; c. 1104.)

§ 110-92. *Duties of State and local agencies.* — Nothing in this Article shall be interpreted to interfere with the authority of the Department of Human Resources to visit or approve or disapprove a day-care facility for purchase of care with federal funds available for such purposes or for placement of children from families receiving financial assistance or other services through the Department of Human Resources or a county department of social services. Provided the Department of Human Resources shall have no authority to inspect a private day-care facility not choosing to participate in federally purchased day-care or family assistance program financed by public or charitable funds.

When requested by an operator of a day-care facility or by the Secretary of Administration, it shall be the duty of local and district health departments to visit and inspect a day-care facility to determine whether the facility complies with the health and sanitation standards required by this Article and with the minimum health and sanitation standards developed by the Commission for Health Services as authorized by G.S. 110-91(1), and to submit written reports on such visits or inspections to the Department on forms approved by the Commission and provided by the Department.

When requested by an operator of a day-care facility or by the Secretary, it shall be the duty of the local and district health departments, and any building inspector, fire prevention inspector, or fireman employed by local government, or any fireman having jurisdiction, or other officials or personnel of local government to visit and inspect a day-care facility for the pur-

poses specified in this Article, including plans for evacuation of the premises and protection of children in case of fire, and to report on such visits or inspections in writing to the Secretary of Administration on forms provided by the Commission so that such reports may serve as the basis for action or decisions by the Secretary or Commission as authorized by this Article. (1971, c. 803, s. 1; 1973, c. 476, ss. 128, 138; 1975, c. 879, s. 15.)

§ 110-93. *Licensing procedure.* — (a) Each operator of a day-care facility shall annually apply to the Commission for a license. The application shall be in such form as is required by the Commission. Each operator seeking a license shall be responsible for accompanying his application with the necessary supporting data and reports to show conformity with the standards established or authorized by this Article including reports from the local and district health deportments, local building inspectors, local firemen, voluntary firemen, and others, on forms which shall be provided by the Commission.

(b) If an operator conforms to the standards established or authorized by this Article as shown in his application and other supporting data, the Secretary of Administration shall issue a license effective for one year subject to suspension or revocation for cause as provided in this Article. If the applicant fails to conform to the required standards, the Secretary may issue a provisional license under the policies of the Commission provided that the operator shall be notified in writing by registered or certified mail of the reasons for issuance of a provisional license.

(c) Each licensed operator of [a] day-care facility must annually apply in order to renew his license and must accompany such renewal application with such supporting data and reports as are required to show conformity with the standards established under this Article.

(d) Repealed by Session Laws, 1977, c. 929, s. 1. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 4, s. 4; c. 929, s. 1.)

§ 110-94. *Administrative Procedure Act.* — The provisions

of General Statutes Chapter 150A known as the Administrative Procedure Act shall be applicable to the Child Day-Care Licensing Commission. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 929, s. 2.)

§§ 110-95 to 110-97. Repealed by Session Laws 1977, c. 929, s. 1.

§ 110-98. *Mandatory license.* — It shall be unlawful for any day-care facility to offer or provide day care without being licensed under the provisions of this Article. In order to provide for gradual implementation of the licensing program, each day-care facility shall register with the Board between January 1 and April 1, 1972, which registration shall be valid in lieu of license until the day-care facility is licensed or until December 31, 1972, whichever is earlier, provided that the Board, upon recommendation of the Director, may extend the validity of such registration in individual cases until July 1, 1973, as to any day-care facility which is not licensed by January 1, 1973. (1971, c. 803, s. 1.)

§ 110-98.1. *Prima facie evidence of existence of day-care facility.* — A child-care arrangement providing day care for more than five children for more than four hours per day on two or more consecutive days shall be prima facie evidence of the existence of a day-care facility. (1977, c. 4, s. 6.)

§ 110-99. *Display of license.* — Each day-care facility shall maintain its current license displayed in a prominent place at all times so that the public may be on notice that the facility is licensed and may observe any grade or rating which may appear on the license. (1971, c. 803, s. 1.)

§ 110-100. *Licenses are property of the State.* — Any license issued to a day-care facility under this Article shall remain the property of the State and may be removed by persons employed or designated by the Secretary of Administration in the event that the license is not renewed or is revoked or has

expired or in the event that the grade or rating is changed. (1971, c. 803, s. 1; 1975, c. 879, s. 15.)

§ 110-101. *Registration.* — It shall be unlawful for any person to offer or provide a day-care plan unless such day-care plan is registered with the Commission in accordance with the system for registration which shall be developed by the Commission. (1971, c. 803, s. 1; 1975, c. 879, s. 15.)

§ 110-102. *Information for parents.* — The Secretary of Administration shall provide to each operator of a day-care facility a summary of this Article for the parents, guardian, or full-time custodian of each child receiving day care in the facility to be distributed by the operator. The summary shall include the name and address of the Secretary of Adminsitration and the address of the Commission. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 1011, s. 3.)

§ 110-103. *Penalty.* — Any person who violates the provisions of G.S. 110-98 through G.S. 110-102 shall be guilty of a general misdemeanor. (1971, c. 803, s. 1.)

§ 110-104. *Injunctive relief.* — The Secretary or his designee is empowered to seek injunctive relief in the superior court of the county in which a day-care center is located against the continuing operation of that day-care facility at any time, whether or not any administrative proceedings are pending. The superior court may grant injunctive relief, temporary, preliminary or permanent when there is any violation of this Article, or of the rules and regulations promulgated by the Commission, which threatens serious harm to children in the day-care facility or when a final order to deny or revoke a license has been violated or when a day-care facility is operating without a license. (1977, c. 4, s. 5; c. 929, s. 3; c. 1011, s. 1.)

Supreme Court, U. S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

80-14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-14

FAYETTEVILLE STREET CHRISTIAN SCHOOL, *et al.*
Appellants,
v.
STATE OF NORTH CAROLINA, *et al.*
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

RUFUS L. EDMISTEN
Attorney General
ANDREW A. VANORE, JR.
Senior Deputy Attorney General
ANN REED
Special Deputy Attorney General
COUNSEL FOR APPELLEES
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Telephone No.
(919) 733-4618

DI CESARE - Printing — 331-8101 — Washington, D.C. 20006

INDEX

PAGE

Jurisdictional Statement 1

Statement of the Case 2

Argument 4

Conclusion 12

Certificate of Service 13

TABLE OF AUTHORITIES

Cases:

Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) 7

Conference v. Creech and Teasley v. Creech, 256 N. C. 128, 123 S. E. 2d 619 (1962) 7

Fowler v. Rhode Island 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953) 7

Huskins v. Hospital, 238 N. C. 357, 78 S. E. 2d 116 (1953) 7

Pruitt v. Williams, 288 N. C. 368, 218 S. E. 2d 348 (1975) 7

Waff Bros. v. Bank, 289 N. C. 198, 221 S.E. 2d 273 (1976) 6

Wisconsin v. Yoder, 406 U. S. 205 at 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) 7

Statutes:

North Carolina General Statute §1-277 ..... 6, 11

North Carolina General Statute §7A-27 .... 6, 11

North Carolina General Statute §110-98 2

Article 26 of Chapter 1 of the General Statutes of North Carolina 6

Article 7 of Chapter 110 of the General Statutes of North Carolina 3, 6, 7

28 U.S.C. §1257(2) 2

Other Authorities:

Rule 16 (1)(b), Rules of the Supreme Court of the United States 1

Rule 16 (1)(c), Rules of the Supreme Court of the United States 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-14

FAYETTEVILLE STREET CHRISTIAN SCHOOL, *et al.*
Appellants,
v.
STATE OF NORTH CAROLINA, *et al.*
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, appellees move the Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth. In the alternative, appellees move the Court pursuant to Rule 16(1)(c) of the Rules of this Court to affirm the judgment of the Supreme Court of North Carolina.

JURISDICTIONAL STATEMENT

This is a direct appeal under 28 USC §1257(2) from the Supreme Court of North Carolina denying on the grounds that it was premature appellants' appeal upon a purported assertion of a substantial question arising under the Constitution of the United States and remanding the case to the trial court for further proceedings. The original decision of the Supreme Court of North Carolina containing the judgment of that court here sought to be reviewed is reported in 299 N.C. 351, 261 S. E. 2d 908. The opinion of that court containing its judgment after rehearing, reaffirming its original judgment, is reported in 299 N. C. 731, 265 S. E. 2d 387. The opinion of the North Carolina Court of Appeals containing its judgment from which defendants appealed to the Supreme Court of North Carolina is reported in 42 N.C. App. 665, 258 S.E. 2d 459. Appellants contend that N.C.G.S. 110-98, as applied to them, is in conflict with the Free Exercise of Religion Clause of the First Amendment, incorporated into the Fourteenth Amendment, to the Constitution of the United States and that the judgment of the Supreme Court of North Carolina that the order from which appellants appealed to that court was not appealable under State law is a final judgment which denies to them their rights under the First and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

On October 20, 1978, the Child Day-Care Licensing Commission of the North Carolina Department of Administration and Joseph W. Grimsley, Secretary of Administration, by and through the Attorney General of

North Carolina, filed this action against 11 church-operated day-care facilities, the chief administrative officers (operators) of these day-care facilities and all others similarly situated. The plaintiffs (appellees herein) sought a declaration of the extent of their right to regulate day-care facilities by licensing together with a preliminary and permanent injunction enjoining the defendants (appellants herein) from operating any day-care facilities until such time as they had obtained valid licenses to operate their day-care facilities pursuant to Article 7 of Chapter 110 of the General Statutes and the regulations promulgated thereunder. Plaintiffs' motion for preliminary injunction was heard at a special session of the Wake County, North Carolina, Superior Court on December 8, 1978. By order entered December 11, 1978, the Superior Court enjoined the named defendants, their agents, servants, employees, members or anyone else acting by, under, through or in concert with them from opening or operating any day-care facilities until such time as they had complied with Article 7 of Chapter 110 of the General Statutes of North Carolina and the regulations promulgated thereunder.

The court also considered defendants' motion to dismiss at the special session of December 8, 1978, and by separate order filed December 11, 1978, denied this motion.

The defendants gave notice of appeal to the North Carolina Court of Appeals, and that court granted a writ of supersedeas pending its decision. On September 4, 1979, the North Carolina Court of Appeals filed its judgment affirming the order of the Superior Court.

The defendants filed notice of appeal and petitions for discretionary review and writ of supersedeas with the Supreme Court of North Carolina. On September 25, 1979, the Supreme Court of North Carolina entered an order allowing the petition for discretionary review and the petition for writ of supersedeas. Thereafter, on February 1, 1980, the Supreme Court of North Carolina rendered its judgment that both the denial of defendants' motion to dismiss and the granting of the preliminary injunction constituted nonappealable interlocutory orders, vacating the judgment of the North Carolina Court of Appeals, vacating its own writ of supersedeas and remanding the case to the Superior Court for further proceedings. The defendants filed a petition for rehearing and the Supreme Court of North Carolina allowed this petition, reinstating its writ of supersedeas on February 20, 1980. Following the rehearing, the Supreme Court of North Carolina entered its judgment of April 8, 1980, reaffirming its original judgment, again vacating its writ of supersedeas and remanding the case to the Superior Court for further proceedings.

The defendants filed their Notice of Appeal to the Supreme Court of the United States on June 19, 1980, and served their Jurisdictional Statement upon the plaintiff appellees on July 2, 1980.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court, for the following reasons:

The opinion of the Supreme Court of North Carolina from which appellants appeal deals only with procedural questions under North Carolina law and is not intended to express that court's opinion on the constitutional issues raised by appellants nor does it affect appellants' rights under the Constitution.

Appellants argue that the federal question presented by this appeal is:

> "When a church, or a department thereof, operates, or proposes to operate a child day care center, as part of its religious ministry, upon its own property in a safe and orderly manner, may a state, consistent with the First and Fourteenth Amendments, require it, as a condition precedent to such operation, to procure a license or permit from a state agency vested by statute with a discretion to deny it?"

(Jurisdictional Statement, p. 14).

The Supreme Court of North Carolina was in fact presented with this question by appellants in their appeal to that court from an adverse determination of the question by the North Carolina Court of Appeals. Unlike the North Carolina Court of Appeals, however, the Supreme Court of North Carolina specifically refrained from expressing its opinion on this constitutional question. (Jurisdictional Statement, pp. 31-32). The court concluded "that both the denial of defendants' motion to dismiss and the granting of the preliminary injunction constitute non-appealable interlocutory orders." (Jurisdictional Statement p. 23).

Appellees contend that the opinion of the Supreme Court of North Carolina was a correct interpretation of the North Carolina statutes dealing with appeals of decisions form the trial court, N.C.G.S. 1-277 and N.C.G.S. 7A-27, and that since this opinion expressly does not pass on the federal question raised by appellants, their appeal to this Court should be dismissed.

In the complaint filed against appellants by appellees on October 20, 1978, appellees sought a declaratory judgment pursuant to Article 26 of Chapter 1 of the General Statutes of North Carolina relating to their authority to regulate appellants' day-care facilities by licensing as required by Article 7 of Chapter 110 of the General Statutes of North Carolina. Ancillary to this declaratory relief, appellees sought interim relief in the form of an injunction enjoining the appellants from operating any day-care facilties until such time as they had complied with the day-care licensing laws. Each of the eleven appellants had in the past been licensed as a day-care facility, but prior to the filing of this action each had indicated that it would no longer accept a license from the State on religious grounds. The Superior Court of Wake County granted appellees' application for a preliminary injunction based on the required findings that:

1. Probable cause existed that appellees would be able to establish their right to regulate appellants' day-care facilities; and

2. A reasonable apprehension of irreparable loss to appellees' interests existed unless the preliminary relief was granted. See *Waff Bros. v. Bank*, 289 N.C.

198, 221 S. E. 2d 273 (1976). *Pruitt v. Williams,* 288 N. C. 368, 218 S. E. 2d 348 (1975); *Conference v. Creech and Teasley v. Creech,* 256 N.C. 128, 123 S.E. 2d 619 (1962); *Huskins v. Hospital,* 238 N. C. 357, 78 S. E. 2d 116 (1953).

Appellees agree that "It is no business of courts to say what is religious practice or activity for one group is not religion under the protection of the First Amendment." *Fowler v. Rhode Island,* 345 U. S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953). However, the state's right to protect the public interest in various ways has long been recognized, and while appellants' freedom to believe remains inviolate, their freedom to act is subject to reasonable regulation for the protection of society. *Cantwell v. Connecticut,* 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). In the case of day-care licensing, after an extensive legislative study, it was concluded that the *physical* health, safety and welfare of children in day-care facilities required the protection of minimum safeguards. Article 7 of Chapter 110 of the General Statutes was passed to provide these safeguards. The requirement of a license contained in this Article is a formality, a piece of paper to be placed on the wall of a day-care center which conforms to the minimum standards set out in the Article.

Appellees have contended throughout this matter that in resolving their conflict with appellants the applicable test of whether Article 7 of Chapter 110 of the General Statutes of North Carolina did in fact interfere with appellants' free exercise of religion is the test set out in *Wisconsin v. Yoder,* 406 U. S. 205 at 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). Enforcement of the challenged statute is permissible if (1) the statute does

not deny the free exercise of religious belief or, if so, (2) a state interest of sufficient magnitude overrides the legitimate private interest invoking the protection of the Free Exercise Clause. When this test is applied to the facts of this case, appellees contend that it can be demonstrated that: (1) The challenged Article does *not* in any way prevent appellants from freely exercising their religion, since the standards provided in the Article relate strictly to physical health and safety protection, and since the license itself is a mere formality indicating compliance with the standards; and (2) Even if some interference could be shown, the state interest in protecting the physical health and safety of children in day care is of sufficient magnitude to override apellants' interest under the First Amendment.

The Supreme Court of North Carolina did not reach this question and has never expressed any opinion as to the contentions raised either by appellants or by appellees. Instead, the Supreme Court of North Carolina concluded that the injunction from which the appeal was taken, being designed merely to preserve the last uncontested status which existed between the parties, was purely interlocutory and was insufficient to raise on appeal the constitutional issues set out in the complaint. The Supreme Court reasoned as follows:

> "Where, as here, a party seeks on no more than pleadings and affidavits to challenge the constitutionality of a statute, not on its face but as applied to that party, and pursues that challenge by attempting to appeal from an interlocutory order, an appellate court should be especially mindful of the dangers inherent in the premature exercise of its jurisdiction.

These considerations are particularly relevant in the context of the case before us. Defendants do not challenge the Act on its face. They strenuously argue, however, that the Act *cannot apply to them* without exceeding the bounds of certain constitutional limitations. More specifically, they contend that the operation of each day-care center is an integral part of the ministry of its supporting church and that the mandatory state licensing of the facilities violates the free exercise of their religion. With the exception of defendants' own affidavits, however, there is nothing in the record to guide the inquiry of this Court or of any other judicial tribunal into the degree to which defendants' day-care services are in fact religious activities warranting special constitutional protection. Nor does the record reveal any factual basis, save that suggested by general statements in the pleadings, upon which to determine the extent to which the Act's regulations do in fact interfere with defendants' allegedly religious conduct. In short, defendants' assertions in their affidavits have not been tested by cross-examination; their allegations have not been buttressed by the introduction of evidence; and there has been no resolution of the factual issues upon which defendants' constitutional claims are grounded. Yet the validity of their constitutional argument can be measured on appeal only against a fully developed factual record which clearly delineates the nature and scope of the unconstitutional intrusion which defendants

> assert arises from the burden imposed by the Act. Such a record is essential to the proper determination of the constitutional infirmities, if any, of a statute's application to a particular situation. Absent such a record, our intervention is necessarily premature. This Court will pass upon the constitutionality of a statute *only when* the issue is squarely presented upon an adequate factual record and *only when* resolution of the issue is necessary to determine the rights of the parties before it. Nicholson v. Education Assistance Authority, 275 N. C. 439, 447, 168 S. E. 2d 401, 406 (1969); Carbide Corp. v. Davis, *supra,* 253 N.C. at 327, 116, S.E. 2d at 794." 299 N.C. at pp. 358-359.
>
> (Jurisdictional Statement pp 30-31)

Appellants have contended to this Court that they can in fact develop no additional evidence which will further clarify the constitutional issues before the court and that the decision of the Supreme Court of North Carolina is therefore a final decision which denies to them their rights under the First Amendment. The question of whether or not appellants will be able to develop additional evidence supporting their claim during a trial on the merits should not be dispositive of the issue of the appealability of this matter.

Appellants provide day care for approximately 700 children in their day-care facilities. All of the appellants held day-care licenses without any assertion that the licenses interfered with their religious beliefs until the

months immediately preceding the filing of appellees' complaint for declaratory relief. Thus, while appellants' claim of a violation of their religious freedom led appellees to seek declaratory relief, it was appellants' change of status from licensed to unlicensed day-care facilities which led appellees to seek ancillary injunctive relief to preserve the *status quo* between the parties until the constitutional issues could be resolved. Therefore, while the complaint originally filed requested two separate forms of relief, only one form of relief has in fact been granted to appellees, and it was only the propriety of this one form of relief which was the subject of appellants' appeal. The Supreme Court of North Carolina held that while an order granting preliminary injunctive relief might be appealable if there was a claim that a statute was facially unconstitutional, where, as here, the claim was only that the statutes were unconstitutional as applied to appellants, an appeal from such an order was premature.

The holding appealed from was, therefore, a narrow one, expressly intended to interpret N.C.G.S. 1-277 and N.C.G.S. 7A-27, both of which deal only with appeals from trial courts. Appellants still have the opportunity to present their constitutional questions to the trial court and if the questions are decided adverse to them, they may then appeal this decision. Since appellants' constitutional claims have not been determined by the highest state court, appellants' appeal to this Court is also premature.

CONCLUSION

For the foregoing reasons, appellees contend that either the appeal should be dismissed or the opinion of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Andrew A. Vanore, Jr.
Senior Deputy Attorney General

Ann Reed
Special Deputy Attorney General

N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tel. No. (919) 733-4618

CERTIFICATE OF SERVICE

I hereby certify that I am Special Deputy Attorney General for the State of North Carolina; that I have served three copies of the MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE TO AFFIRM JUDGMENT by depositing copies of same in the United States Mail at Washington, D.C., first class postage paid, addressed to:

Mr. I. Beverly Lake
Lake and Nelson, P.A.
Post Office Box 1306
Raleigh, North Carolina 27602

This 30th day of July, 1980.

Andrew A. Vanore, Jr.
Senior Deputy Attorney General
N. C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-4618

COUNSEL OF RECORD FOR APPELLEES